Second Edition

International Copyright

Paul Goldstein
Bernt Hugenholtz

Principles, Law and Practice

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Preface to the First Edition

The idea for this book originated in a conversation with Lewis Flacks over a dozen years ago. Although death has sadly stilled Lew's voice, his wisdom on matters of international copyright endures and, I hope, is reflected, however faintly, in the pages that follow.

I am also indebted to Professor W. R. Cornish of Cambridge University and Professor Jane C. Ginsburg of Columbia Law School for reviewing and commenting on the manuscript. Collaboration and conversations with colleagues in the Intellectual Property Group at Morrison & Foerster have enriched my understanding of international copyright law and practice. In particular, the discussion of licensing and contract choice of law has benefited from my work with William Schwartz and other lawyers in the Group's licensing practice, and the discussion of E.C. directives has benefited from my work with Thomas Vinje in the firm's Brussels office.

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Finally, and as ever, I am indebted to Lynne Anderson for coordinating and typing the manuscript through its several drafts and for keeping the project on track with her incomparable energy, wit and good humor.

Portola Valley, California
1 August 2000
Paul Goldstein

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Preface to the Second Edition

Almost a decade has passed since this book's first edition in 2001, a decade that has brought enormous change to the law of copyright. The Internet, just years ago considered a new technology, has more recently become a mainstream medium for disseminating a wide variety of copyrighted works—whether authorized by right holders or not. Borderless by its very nature, the Internet has enlarged the importance of international copyright law both at the national level, where courts now routinely confront cases of cross-national copyright infringement, and at the international level, where substantive copyright norms and copyright enforcement standards are proliferating in an ever-widening array of international instruments—from bilateral trade arrangements to the forthcoming Anti-Counterfeiting Trade Agreement.

The changes wrought by the past decade have required a thorough updating and partial revision of this book. This edition contains updates of case law and legislation in the countries that are principally covered by the treatise: France, Germany, the United Kingdom and the United States, and occasionally from other jurisdictions. Recent developments have occasioned other changes as well. Readers familiar with the first edition will immediately notice its new format, which—the authors hope—will make this book more accessible to advanced students as well as to professional readers. Further, while leaving the substance of the first edition largely intact, the book has undergone considerable structural change, and now divides into twelve rather than five chapters, and includes an extensive bibliography. The second edition has also brought in a second author: Professor P. Bernt Hugenholtz of the University of Amsterdam, which has enabled a more expansive treatment of the law of copyright in the European Union and its member states.

The authors are very grateful to Sabina Gorini for immaculate copy-editing and research assistance, and to Lynne Anderson for her fine work with the manuscript. Once again, the reference staff of the Stanford Law Library came through with colors flying: Paul Lomio, Sonia Moss, Sergio Stone, Kate Wilko, George Wilson and Sarah Wilson have our deep gratitude.

Special thanks are also due to Stef van Gompel and Ana Ramalho of the Institute for Information Law at the University of Amsterdam, for reviewing

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Stanford/Amsterdam
1 June 2010
Paul Goldstein/Bernt Hugenholtz

Table of Abbreviations

Australia, Copyright Act
Copyright Act 1968, Act No. 63 of 1968 as amended.

Belgium, Copyright Act
Law on Copyright and Neighboring Rights (*Loi relative au droit d'auteur et aux droits voisins*), June 30, 1994.

Berne Convention, 1971 Paris Text
Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris, July 24, 1971.

Brussels Convention
European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, September 27, 1968, 8 I.L.M. 229 (1969).

Brussels I Regulation
Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ No. L 12/1, January. 16, 2001.

Brussels Satellite Convention
Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, Brussels, May 21, 1974.

Canada, Copyright Act
Copyright Act (R.S.C. 1985, ch. C-42, Sec. 60).

Council Regulation No. 1383/2003
Council Regulation (EC) No. 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, OJ No. L 196/7, August 2, 2003.

E.C. Copyright in the Information Society Directive
Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society, OJ No. L 167/10, June 22, 2001.

E.C. Database Directive
Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ No. L 77/20, March 27, 1996.

E.C. E-Commerce Directive
Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ No. L 178/1, July 17, 2000.

E.C. Enforcement Directive
Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ No. L 195/16, June 2, 2004.

E.C. Rental Right Directive
Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ No. L 376/28, December 27, 2006.

E.C. Resale Right Directive
Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ No. L 272/32, October 13, 2001.

E.C. Satellite and Cable Directive
Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission OJ No. L 248/15, October 6, 1993.

E.C. Software Directive
Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ No. L 111/16, May 5, 2009.

E.C. Term of Protection Directive
Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ No. L 372/12, December 27, 2006.

France, Intellectual Property Code
Intellectual Property Code (*Code de la propriété intellectuelle*), Law No. 92-597, July 1, 1992, as amended.

Geneva Phonograms Convention
Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, Geneva, October 29, 1971.

Germany, Copyright Act
Law on Copyright and Neighboring Rights (*Urheberrechtsgesetz*), September 9, 1965, as amended.

Italy, Copyright Act
Law on copyright (*Legge sul diritto d'autore*), No. 633, April 22, 1941, as amended.

Japan, Copyright Act
Copyright Law (*Chosakuken Ho*), Law No. 48, May 6, 1970.

Lugano Convention
European Communities-European Free Trade Association: Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, September 16, 1988, 28 I.L.M. 620 (1989).

NAFTA
North American Free Trade Agreement, Ottawa, December 11, 17, 1992; Washington, D.C., December 8, 17, 1992; and Mexico City, December 14, 17, 1992.

Netherlands, Copyright Act
Copyright Law (*Auteurswet*), September 23, 1912, as amended.

Rome Contracts Convention
Convention on the Law Applicable to Contractual Obligations, Rome, June 19, 1980.

Rome Convention
International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, October 26, 1961.

Rome I Regulation
Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), O.J. No. L 177/6, July 4, 2008.

Spain, Copyright Act
Law on Intellectual Property (*Ley de Propiedad Intelectual*), Law No. 22, November 11, 1987.

Treaty on the International Registration of Audiovisual Works
Treaty on the International Registration of Audiovisual Works, Geneva, April 20, 1989.

TRIPs Agreement
Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Annex 1C to the Agreement Establishing the World Trade Organization, Marrakesh, April 15, 1994, 33 I.L.M. 1, 83-111 (1994).

United Kingdom, Copyright, Designs and Patents Act
Copyright, Designs and Patents Act 1988, Statutory Instrument 1989/816.

U.S. 1909 Copyright Act
Act of March 4, 1909, ch. 320, 35 Stat., as amended.

U.S. 1976 Copyright Act
17 U.S.C. §§101 *et seq*. (2006), Pub. L. No. 94-553, 90 Stat. 2541, as amended.

U.S. House Report
House Report on Copyright Act of 1976, H.R. Rep. No. 1476, 94th Cong., 2d. Sess. (1976).

Universal Copyright Convention, 1971 Paris Text
Universal Copyright Convention, as revised at Paris, July 24, 1971.

WIPO Copyright Treaty
WIPO Copyright Treaty, adopted by the Diplomatic Conference, Geneva, December 20, 1996.

WIPO Performances and Phonograms Treaty
WIPO Performances and Phonograms Treaty, adopted by the Diplomatic Conference, Geneva, December 20, 1996.

Journals

Am. J. Int'l L.
American Journal of International Law (American Society of International Law, Washington, D.C.).

Bull. Copr. Soc'y
Bulletin of the Copyright Society of the U.S.A.

Cardozo Arts & Ent. L.J.
Cardozo Arts & Entertainment Law Journal (Benjamin N. Cardozo School of Law, Yeshiva University, New York).

Colum.-VLA J.L. & Arts
Columbia-VLA Journal of Law and the Arts (Columbia University School of Law).

Copyright
Copyright (World Intellectual Property Organization, Geneva).

Copyright Reporter
Copyright Reporter, Journal of the Copyright Society of Australia.

E.I.P.R.
European Intellectual Property Review (ESC Publishing Limited, Oxford).

Ent. L.R.
Entertainment Law Reporter (Entertainment Law Reporter Publishing Company, Santa Monica).

GRUR (Int.)
Gewerblicher Rechtsschutz und Urheberrecht (Internationaler Teil) (Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich).

IDEA
IDEA, the Journal of Law and Technology (Franklin Pierce Law Center, New Hampshire).

I.I.C.
International Review of Industrial Property and Copyright Law (Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich).

I.L.M.
International Legal Materials (American Society of International Law, Washington, D.C.).

Int. Prop. J.
Intellectual Property Journal (Carswell Thomson Professional Publishing, Scarborough, Ontario).

J. Copr. Soc'y
Journal of the Copyright Society of the U.S.A.

J. of World Intellectual Property
Journal of World Intellectual Property (Werner Publishing Company Ltd., Geneva).

R.I.D.A.
Revue Internationale du Droit d'Auteur (Association Française pour la diffusion du Droit d'Auteur National et International, Paris).

PART

I

Principles of International Copyright

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CHAPTER
1

Introduction

1.1 Common Rules and Principles 4

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This book surveys the law of copyright between and among nations. Apart from applicable legal rules, the book describes the practices that animate international copyright and the principles that underlie it. The practicing lawyer engaged in licensing or litigating a copyrighted work abroad, or overseeing the exploitation of a foreign work in his own country, will find guidance in these pages; so, too, will the researcher or student who wants to understand the forces that shape the copyright and neighboring rights laws of other countries and that control their interplay in the international system.

National laws on copyright and neighboring rights have far more in common than not, a fact that makes it possible to treat the laws of many countries in a single, relatively compact volume. Widespread adherence to the Berne Convention for the Protection of Literary and Artistic Works explains much of this harmony—164 countries today belong to the Berne Union—and the convergence of national laws is growing closer still as the TRIPs Agreement, with 153 adherents, has brought national laws into more immediate compliance with Berne norms, as well as with norms introduced by the TRIPs Agreement itself. For those circumstances in which national laws do diverge, the book sets out the rules of private international law that will guide determinations of applicable law.

§1.1 Common Rules and Principles

A handful of universal rules and principles underpin national copyright laws. Around the world, copyright creates exclusive rights in "literary and artistic works" that are "original."[1] Protected works range from high art, such as poems and paintings, to lowly information products, such as maps and almanacs.[2] The rights granted under copyright will vary with legal traditions and national implementations, but will usually, at the very least, consist of the exclusive rights to reproduce, distribute, publicly perform, broadcast, and otherwise communicate a work to the public.[3] Most jurisdictions also prescribe moral rights to protect an author's reputational interests, principally, the rights of paternity (to be named as the author of a work) and of integrity (to prevent distortions of the work).[4]

National rules on authorship and ownership usually identify the actual creator of a work as its author and initial owner, subject to exceptions in cases of works made in the course of employment or otherwise "for hire."

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1. Berne Convention, 1971 Paris Text Art. 2. *See* §6.1, below.
2. *See* §6.1.2, below.
3. *See* §9.1, below.
4. *See* Chapter 10.

All countries impose a durational limit on at least copyright law's economic rights, normally measured by fifty or seventy years after the author's death,[5] and also limits on the scope of rights, in the form of exemptions and limitations that seek to reconcile protection for the rights of authors with the interests of society at large.

Another universally acknowledged axiom is that copyright protects only original expression and leaves ideas—the building blocks of creativity—free for all to use.[6] Thus, legislation or case law in many countries holds that a literary work's themes, plots, and stock characters are unprotectible, as are discrete colors and shapes in visual art, and rhythm, tone, and harmony in music.

Freedom of contract governs copyright transactions around the world. It is widely thought that contractual freedom prevails as a norm only in common law countries, and that civil law countries, by contrast, closely regulate copyright contracts. In fact, and as a rule, courts everywhere enforce copyright contracts according to their privately agreed terms. Legislatures and courts have, to be sure, carved out exceptions to the freedom of contract principle, but these exceptions are no more evident in civil law countries than in common law countries. For example, the German Copyright Act's "purpose of transfer" rule requires courts to narrowly interpret broadly worded transfers of rights; but most American courts will similarly construe ambiguous contract language to favor the author. Indeed, the German rule is a far less severe inroad on freedom of contract than two provisions in the U.S. Copyright Act that give authors a nonwaivable right to terminate their copyright transfers after a prescribed period.

Not all copyright principles are universal, nor are all divisions false. To take just one example, a distinctive commitment in the United States to individual autonomy in political and economic life has left a visible mark on the nation's copyright law. American fair use doctrine, permitting the free use of copyrighted works under circumstances that some other countries would find hard to excuse, clearly mirrors the special place of free speech in the American constitutional scheme. Fair use and other statutory exemptions and limitations also reflect the American resistance to collective administration, a common institution in Europe and elsewhere, as a solution to the transaction costs that so often arise at the intersection of copyright and new technologies. While collecting societies have flourished in other countries, traditions of individualized bargaining continue to constrain the role of collecting societies in the United States.

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5. *See* Chapter 8.
6. *See* §6.1.3.1, below.

§1.2 The Rationales of Copyright

Writers commonly identify the "author's right" tradition of civil law countries with principles of natural right and the "copyright" tradition of common law countries with the principle of utilitarianism. Whatever force this division may once have had, its practical or intellectual force today should not be overstated.[7] An explicit natural rights strain did not emerge in the literature on author's rights until late in the nineteenth century, well after the first enactment of copyright laws on the European continent; almost a century earlier, a distinctly utilitarian ideology was already at play in the French revolutionary copyright laws. Similarly, while an indisputably utilitarian thread runs through much of the intellectual history of English and American copyright, so, too, does a vibrant motif that the author has a natural right to profit from his creativity and labor. These traditional differences will move still further into the background as copyright and authors' rights systems gradually converge under the combined influences of international harmonization and a growing international information economy. Nonetheless, the distinction between utilitarianism and natural rights ideology that has traditionally divided national approaches to the protection of literary and artistic works continues to play a role in legal discourse. Where common law jurisdictions more evidently espouse utilitarian rationales, as exemplified in the U.S. Constitution's provision "to promote the progress of science and the useful arts,"[8] civil law countries, where the authors' rights tradition dominates, attend more closely to notions of natural rights, as is illustrated by the first sentence of the French Intellectual Property Code: "The author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons."[9] Civilian lawyers find additional justification for author's rights in the argument that a work of authorship bearing the personal imprint of its creator is in effect an extension of the author's personality. The "personality" argument animates not only moral rights, but also the German doctrine of "monism," i.e., the principle that economic and moral rights are inseparable.[10]

Although the distinction between the utilitarian and natural justice rationales may have lost much of its political significance today, it continues to explain certain substantive differences between the national laws of countries following the two traditions. For example, in the United States, the preeminently utilitarian doctrine of fair use invites courts to permit a broad spectrum of socially and culturally valuable, but unauthorized, uses so long as

7. *See* Chapter 2.
8. U.S. Const. Art I, § 8, cl. 8.
9. France, Intellectual Property Code Art. L. 111-1.
10. *See* §2.2.1, below.

they do not disproportionately harm the market for the copyrighted work; by contrast, courts in author's rights countries, such as France, incline to interpret statutory limitations to copyright as "exceptions" that are to be narrowly construed.

Similarly, moral rights are more deeply rooted and firmly protected in the author's rights laws of civil law countries than in common law jurisdictions. Waiver of moral rights, a practice generally allowed in common law countries, will be permitted in civil law jurisdictions only under the strictest of conditions, if at all.[11]

Rules on ownership of rights also reflect the division between the utilitarian and natural rights traditions. Both common law and civil law countries follow the principle that the author and initial owner of a work is its actual creator. But exceptions to this principle are more common in common law countries—for example, the British rule that designates the producer of a film as the film's author and initial owner.[12] By contrast, the laws of France and most other civil law countries designate every person creatively involved in making a film as a coauthor of the film, but not the film's producer.

Copyright and author's rights doctrine also divide on the legal status of performing artists and creative entrepreneurs, such as phonogram and film producers and broadcast organizations. Copyright laws in most common law countries extend their reach to include performers, producers, and other creative entrepreneurs, while author's rights regimes will deny copyright protection to these contributors, offering more limited "neighboring" rights in its place.

Apart from their philosophical underpinnings, there is worldwide consensus that copyright and author's right advance the important goals of authorial autonomy and cultural diversity. The grant to creators of exclusive rights in their works of authorship opens the door not only to reaping revenues from the work but in many cases to earning a livelihood. The universal rule that copyright protects expression but not ideas opens a second door, stimulating the production and dissemination of diverse cultural expression, by enabling successive generations of authors to draw freely on the advances wrought by their predecessors. Similarly, copyright's limited term and pervasive exceptions promote cultural diversity; literary and artistic production would stagnate if rights were to persist in perpetuity, to the detriment of follow-on creators aspiring to "stand on the shoulders of giants." Cultural and educational institutions, such as libraries and universities, would also suffer if permissions were required from right holders for every use of a copyright work, no matter how small. Thus, copyright fosters democracy and free speech by sustaining a class of independent authors who can support themselves from

11. *See* §10.5.1, below.
12. *See* §7.5.1, below.

their works without depending on state subsidies or private hand-outs and are therefore immune to the corrosive effects of such patronage.[13]

§1.3 The Politics of International Copyright

The history of the legislative process in civil law and common law countries reveals that, if philosophic inclinations play any role at all in current copyright lawmaking, the politically more relevant distinction is between the arguments that motivate the creation of new rights and the arguments that inform the imposition of limits on these rights. Protectionist natural right impulses, not rigorous utilitarian calibrations, have historically characterized the creation of new rights, and the extension of old ones, in common law and civil law countries alike, just as a pragmatic weighing of benefits and costs characterizes the imposition of limitations on these rights in civil law no less than common law countries.

Human rights undeniably intertwine copyright, but the predominant forces that have shaped copyright law are economic. Global communities of economic interest among copyright owners have been far more potent than ideology—or, for that matter, than the preoccupations of individual nation-states—in forming copyright legislation. When, through the latter part of the nineteenth century, British authors and publishers pressed an isolationist United States to extend copyright to English works, it was American authors and publishers, not British or American readers, who rallied to their cause.

Universal legal rules may mask profound economic and political divisions. The division between economically developed and developing countries is an example, particularly as vexed by the independence movement of the 1950s that freed many less developed countries from European colonial powers. The 1971 copyright compromise in Paris between developed and developing countries only partially resolved the long-simmering discontent that had erupted in the 1967 Stockholm Protocol Regarding Developing Countries,[14] and the TRIPs Agreement's introduction of copyright into the trade process has done little to meliorate the persisting rift, as is apparent from the present discussions of the so-called WIPO Development Agenda.[15] Experience and common sense teach that copyright cannot correct such deep economic disparities; but experience just as surely teaches that a too-rigid insistence on

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13. *See* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L. J. 317 (1996).
14. *See* §11.5, below.
15. *See* The Global Development Agenda. Global Intellectual Property and Developing Countries (Neil W. Netanel ed., Oxford: Oxford University Press 2008).

compliance with established norms can exacerbate disparities, impoverishing the educational and political development that is essential to the growth of markets for literary and artistic works in these parts of the world.

It would however be a caricature to portray the politics of international copyright as a simple tug of war between "maximalist" developed and "minimalist" developing nations. Strong disagreements exist among developed nations themselves, such as the United States and the Member States of the European Union, on a number of important issues. One such contentious issue is moral rights; the United States' persistent refusal to fully implement its obligations under Article 6*bis* of the Berne Convention continues to strain relations with early Members of the Berne Union, such as Germany and France. Another is the *sui generis* database right that was introduced by the European Union in 1996 with the thinly disguised intention to deny protection to American database producers.

International copyright policymaking resembles a game of chess being played simultaneously on several boards. A predictable strategy for countries and trading blocks seeking political advantage is to choose a forum where their political leverage may be best exploited. This strategy of "forum shopping" at least partially explains why contentious issues are so often negotiated concurrently on multiple platforms: at the multilateral level of the WIPO or the WTO, in bilateral or regional relationships (e.g., in the context of Free Trade Agreements), and at the local level of national lawmakers. The number of regional and bilateral trade agreements, many containing intellectual property norms, has risen dramatically in recent years,[16] indicating that the large, economically developed nations that initiate these negotiations view themselves as having more to gain from serial bilateral bargaining than from multilateral negotiations at fora such as WIPO where the vote of each nation, large or small, counts as the same. In some cases, stakeholder nations elect to step outside the framework of intellectual property altogether and shift their efforts to regimes more favorable to their interests, such as trade law, customs law, and the law of human rights.[17] And, while WIPO and the WTO have signed a cooperation agreement,[18] institutional competition between these two large intergovernmental organizations[19] persists. Mediating between the norms of intellectual property and the regime of international trade will remain one of the major challenges of international copyright lawmaking for many years to come.

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16. *See* World Trade Organization (WTO), Notifications of RTAs in Force to GATT/WTO, *available at* http://www.wto.org.
17. Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and the New Dynamics of International Intellectual Property Making*, 29 Yale J. Int'l L. 1–83 (2004).
18. Agreement Between the World Intellectual Property Organization and the World Trade Organization, December 22, 1995, 35 I.L.M. 754 (1996).
19. *See* §3.5, below.

§1.4 The Internationalization of Copyright

Despite over a century of international, regional, and bilateral harmonization, copyright law remains essentially national law. As of January 1, 2010, 164 countries had adhered to the Berne Convention. But, although the substantive copyright norms of this gathering of national laws may gradually be converging, the territorial nature of copyright[20] has so far prevented the emergence of substantive norms with supranational effect. Even in 2010, the copyright law of Country *X* reaches no further than its borders, and no principle of international law requires Country *X* to protect the authors of Country *Y*, unless Countries *X* and *Y* have so agreed by way of a multilateral or bilateral instrument.

International copyright law seeks to coordinate protection of authors and right holders between nation-states. The reasons for international protection press ever more urgent as markets for cultural goods expand globally, and the media that disseminate these literary and artistic works extend to all corners of the world.[21] Indeed, calls for increased international copyright protection have issued since the nineteenth century when booksellers and printers in Belgium, the Netherlands, and the United States actively pirated French and British works. The initial answer to these calls took the form of bilateral agreements, such as the one between Belgium and France in 1854, followed in 1886 by the adoption of the Berne Convention for the Protection of Literary and Artistic Works. Amendments to the Convention in later decades reflect the impact on international copyright of the new media and technologies that were carrying works of authorship across national borders: photography (1896), cinematography (1908), radio broadcasting (1928), television broadcasting and cable distribution (1948). New information technologies were also instrumental in shaping the TRIPs Agreement (1994), and two WIPO Treaties in 1996 gave the Internet a place in international copyright.

Seven European harmonization directives also reflect the impact of information technologies and transnational media on the law of international copyright; among the issues addressed by these directives are the protection of software and databases, and the intricacies of licensing works for satellite broadcasting and cable retransmission across multiple member states.[22]

With copyright law well established in most countries of the world, but territoriality still firmly in place, international copyright today resembles a "patchwork"[23] of independent national laws, each with its own rules on subject

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20. *See* §4.1.2, below.
21. *See* Goldstein 2003.
22. *See* §3.3.1, below.
23. The term "patchwork" was coined by Paul Geller, *From Patchwork to Network: Strategies for International Intellectual Property in Flux*, 9 Duke J. Comp. & Int'l L. 69 (1998) and 31 Vand. J. Transnat'l L. 553 (1998).

matter, ownership of rights, and scope, and each exacting certain requirements of foreign works as a condition of protection.[24] It is an important contribution of the international copyright conventions, principally the Berne Convention and the TRIPs Agreement, that seriously discriminatory practices now mostly belong to the past. The ground rule of national treatment that is enshrined in all current treaties requires contracting states to protect works originating from other contracting countries on terms no less favorable than those afforded to local authors and other right holders.[25] In some, but far from all, countries, qualified foreign right holders may directly invoke the minimum standards of the conventions in the event that national legislation falls below these standards.

Counseling in international copyright cases and transactions, thus, necessarily requires inquiry at several levels: first, analyzing the substance and scope of national laws and assessing whether foreigners may directly invoke local protection; second, determining whether the countries concerned are mutually bound by any relevant international, regional, or bilateral agreements, and whether in the case at hand a conventional exception to national treatment might apply; and, third, examining whether national levels of protection are on a par with minimum rights prescribed by applicable conventions. The increasingly dense network of multilateral, regional, and bilateral agreements that govern copyright relations between states has added some complexity to this analysis,[26] particularly in the field of neighboring rights where reciprocity still frequently prevails over national treatment. And, of course, the rules of private international law must also be consulted to answer questions of proper forum and conflict of law.[27]

§1.5 Outline of this Book

This book divides into two parts. Part One (Chapters 1 through 5) describes the general principles of international copyright and the structure of the main conventions. Following Chapter 2, which sets out in more detail the historic traditions of copyright, Chapter 3 describes the substance and structure of the principal international, regional, and bilateral conventions in the field of copyright and neighboring rights. Chapter 4 discusses the principles of territoriality and national treatment that underlie these conventions and examines the often highly complex issues of private international law: jurisdiction

24. *See* §5.6, below (discussing points of attachment in national laws).
25. *See* §4.2, below.
26. *See* Chapter 3.
27. *See* §§4.3 and 4.4, below.

(choice of forum) and conflict of laws (choice of law). Chapter 5 concludes Part One with a discussion of so-called "scope" rules in the international conventions and in national law, which determine the points of attachment that allow foreign authors to enjoy local copyright protection.

Part Two offers a comparative overview of the substantive norms of copyright. Guided by the substantive minima of the main international conventions, this part describes and compares the rules on copyright and neighboring rights found in national laws. Chapter 6 depicts the rules on the subject matter of copyright and neighboring rights, Chapter 7 the rules on authorship and ownership. The terms of protection for copyright and neighboring rights are examined in Chapter 8. Chapter 9 describes the main economic rights protected under copyright and neighboring rights laws, while Chapter 10 focuses on moral rights. Chapter 11 considers limitations and exemptions, and Chapter 12 analyses copyright enforcement remedies and sanctions. To keep this volume within manageable proportions, this part focuses mainly on the laws of four states: two representing the copyright tradition of the common law jurisdictions (the United States and the United Kingdom) and two representing the author's right tradition (France and Germany). In addition to the laws of these four countries, the comparative analysis regularly refers to the substantive norms of the seven directives that have partially harmonized the laws of copyright and neighboring rights in the European Union, and it also considers diverging approaches from other countries such as Canada, Australia, Japan, Spain, Italy, and the Netherlands, as appropriate.

The reasons behind the choice of the United States, the United Kingdom, France, and Germany as the principal objects of comparison are largely self-evident. One reason is that, taken together, the laws and doctrines of these four countries embody the dominant approaches to the protection of literary and artistic works around the world. A related reason is that these laws are the most widely discussed in legal commentary, and among the most productive sources of case law. Each of these four laws also embodies an influential trait of the tradition to which it belongs. The French statute represents the dualist approach to author's right, pragmatically separating the author's economic rights (limited in time, transferable) from his moral rights (perpetual, inalienable), while the German statute represents the monist approach, fusing economic and moral interests into a single right that is limited in time and at least conceptually inalienable. Britain's legislation approaches the continental model of its European Union partners in several respects—highly specific exceptions from rights, for example, though with a less robust moral right—while the U.S. legislation takes an even more stinting approach to moral right and a far looser approach to limitations, as reflected in its fair use defense.

CHAPTER
2

The Legal Traditions

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2.2.1 Author's Right 19

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Copyright and author's right are the two great legal traditions for protecting literary and artistic works. The copyright tradition is associated with the common law world—England, where the tradition began, the former British colonies, and the countries of the British Commonwealth. The tradition of author's right is rooted in the civil law system and prevails in the countries of the European continent and their former colonies in Latin America, Africa, and Asia.[1]

In principle, the traditions of copyright and author's right rest on sharply differing premises.[2] Copyright's philosophical premise is utilitarian: the purpose of copyright is to stimulate production of the widest possible variety of creative goods at the lowest possible price.[3] The ideal copyright legislator will test every proposal to extend copyright against the criterion of utility and will vote for the proposed extension only if it is demonstrably necessary to stimulate the creation of new works. By contrast, author's right is primarily rooted in the philosophy of natural rights: an author is entitled to protection of his work as a matter of right and justice.[4] The ideal author's right legislator will vote to extend protection without any showing of social necessity and will reject it only if the extended protection would materially hamper socially valuable uses of protected works.

In fact, and on almost every point of consequence, the traditions of copyright and author's right are far more alike than they are unlike. One reason is that the Berne Convention bridges the two traditions, with the result that its extensive minimum standards have dictated substantively similar rules for countries in both camps. Similarities in economic, political, and social structures across the two systems also explain the convergence, as do local industry politics. Professor William Cornish was certainly correct to observe that "[o]ver primary issues of making the rights granted legally effective and so

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1. The socialist approach to copyright that prevailed in the Soviet Union and Eastern Bloc countries following World War II was not so much a tradition, providing a rationale for protecting literary and artistic works, as it was a vehicle for regulating copyright contracts and the organs of publication. Post-socialist copyright law in Central and Eastern European countries has, not surprisingly, followed the pattern of legislation in Western Europe. *See generally* Adolf Dietz, *Trends in the Development of Copyright Law in the Countries of Central and Eastern Europe*, 162 R.I.D.A. 120 (1994). *See also* György Boytha, *The Berne Convention and the Socialist Countries with Particular Reference to Hungary*, 11 Colum.-VLA J. L. & Arts 57 (1986); Ernest K. Pakuscher, *Recent Trends of the German Copyright Law*, 23 Bull. Copr. Soc'y 65 (1973); Serge L. Levitsky, Introduction to Soviet Copyright Law (1964).

   On subsequent copyright developments in Eastern Europe, see generally Eric J. Schwartz, *Recent Developments in the Copyright Regimes of the Soviet Union and Eastern Europe*, 38 J. Copr. Soc'y 123 (1991).
2. *See* §§1.1 and 1.2, above.
3. *See* §2.1, below.
4. *See* §2.2, below.

economically meaningful, the two approaches flow together in a single stream. Where there are divergences, they are often more the product of low political lobbying than of high and disinterested thought."[5]

Copyright politics divide more along sectoral than national lines. A book publisher in England has far more in common with a book publisher in France—or, for that matter, with a French film or record producer—than it does with a library in England; for its part, the English library will have far more in common with a French library. Battles over what works will qualify for protection and over the proper scope of rights in literary and artistic works are usually fought on economic, not philosophical terrain, with publishers and producers typically pitted against libraries and other users.

But differences traceable to a statute's philosophical origins, some having practical consequence, do appear in copyright and author's right legislation. Both common law and civil law countries today protect computer programs as literary works, but they continue to divide on whether performer-oriented productions such as sound recordings and broadcasts merit the dignity of full-scale copyrights or should receive the less-exalted status of neighboring rights. Rules on transferability of rights may also differ, with most civil law countries constraining the grant of copyright more extensively than common law countries.[6] But even in these two contexts, the differences are of degree rather than kind, and the degree of difference is often small. Even in the area of moral rights, where substantive differences between the two systems have always been the most apparent, a gradual rapprochement is evident, with most common law countries today protecting the reputational interests of authors, at least to some extent.

§2.1 The Copyright Tradition

The beginnings of copyright in the common law world trace to Caxton's founding in 1476 of the first printing establishment in England, and to measures initiated by the English Crown to bring this revolutionary new technology under its control. One motive for the Crown regulations was political: to suppress the spread of dissenting views through cheap and easy copies. The other motive was economic. By granting court favorites and others willing to

5. William R. Cornish, *Sound Recordings and Copyright*, 24 I.I.C. 306, 307 (1993). *See generally* Adolf Dietz, *Transformation of Authors Rights: Change of Paradigm*, 138 R.I.D.A. 22 (1988); Kerever 1990; Ginsburg 1990; Alain Strowel, *Droit d'auteur and Copyright: Between History and Nature*, *in* Of Authors and Origins: Essays on Copyright Law (Brad Sherman & Alain Strowel eds., 1992).

6. *See* §7.6.1, below.

pay the price the exclusive right to publish particular books, the Crown put itself in a position to profit from the growing market for literary works. The Crown's political control of book publishing, exercised through the Licensing Acts, continued through the end of the seventeenth century. By the middle of the sixteenth century, however, the Crown had effectively ceded economic control of book publishing to the Stationers' Company, a London guild of printers, bookbinders, and booksellers, through a printing patent that gave the company a monopoly over the English publishing trade. The grant to the Stationers served the Crown's political interests as well, for the Stationers secured their economic monopoly by suppressing trade not only in unauthorized copies of licensed books, but in unlicensed works as well; the Company's seizure of unlicensed works helped the Crown to suppress dissent.[7]

The expiration of the Licensing Act in 1694, and with it the Stationers' power to seize and destroy offending works, effectively deprived the Company of its main weapon in the marketplace. After failing to persuade Parliament to extend its powers, the Stationers shifted their legislative strategy, emphasizing the interests of authors over publishers. The product of their renewed effort was the world's first copyright act, the Statute of Anne,[8] entitled "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned." The Statute gave the Stationers the coercive remedies they sought and confirmed their existing publication rights. In return, the Statute obliterated the Stationers' monopoly by entitling anyone—printer or author—to obtain copyright by the simple act of enrollment in the Company's register. The Statute also substituted a limited term of copyright for the formerly perpetual monopoly—14 years from the work's publication and, if the author was then alive, a second 14-year term.

The Statute of Anne protected only books.[9] Successive acts or amendments added, among other classes of subject matter, engravings;[10] sculptures;[11]

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7. This description of copyright's early history in England draws principally on Lyman Ray Patterson, Copyright in Historical Perspective (1968); Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 Wayne L. Rev. 1119 (1983); Augustine Birrell, The Law and History of Copyright in Books (1899); Bruce Bugbee, Genesis of American Patent and Copyright Law (1967); Benjamin Kaplan, An Unhurried View of Copyright (1967); Harry Ransom, The First Copyright Statute (1956); Mark Rose, Authors and Owners: The Invention of Copyright (1993); Thomas Edward Scrutton, The Law of Copyright (4th ed., 1903).
8. 8 Ann., c. 19 (1710).
9. 8 Ann., c. 19 (1710).
10. 8 Geo. 2, c. 13 (1735).
11. 54 Geo. 3, c. 56 (1814).

paintings, drawings, and photographs;[12] sound recordings;[13] and motion pictures.[14] Just as statutory subject matter expanded to embrace the products of new creative technologies, the range of rights expanded to encompass new dissemination technologies. A performance right was added for dramatic works in 1833[15] and for musical works in 1842;[16] the comprehensive 1911 Copyright Act added a reproduction right in sound recordings.[17] Current English copyright legislation is embodied in the 1988 Copyright, Designs and Patents Act and represents a substantial revision of the 1956 Act. It has been regularly amended, principally to implement European Union copyright directives.

The first U.S. copyright legislation, the Act of 1790[18] "for the encouragement of learning," was closely modeled after the Statute of Anne and was enacted under a constitutional power that linked copyrights with patents: "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[19] The Act, which required registration formalities, gave a 14-year copyright, renewable once, in books, maps, and charts, against unauthorized printing, reprinting, publishing, or vending. As in England, the emergence of new information technologies triggered the expansion of copyright subject matter—photographs were added in 1865,[20] motion pictures in 1912,[21] sound recordings in 1971[22]—and also the expansion of exclusive rights—a public performance right was added in 1856,[23] and rights to dramatize or translate in 1870.[24] The U.S. Congress did not eliminate the notice formality until 1989, under the compulsion of adherence to the Berne Convention; the prospect of Berne membership explains the decision in the 1976 Act to extend the general term of copyright to the Berne minimum term of 50 years after the author's death.[25]

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12. 25 & 26 Vict., c. 68 (1862).
13. Copyright Act, 1 & 2 Geo. 5, c. 46, § 19(1) (1911).
14. Copyright Act, 1 & 2 Geo. 5, c. 46, § 35(1) (1911).
15. Dramatic Copyright Act, 3 Will. 4, c. 15 (1833).
16. Literary Copyright Act, 5 & 6 Vict., c. 45 (1842).
17. Copyright Act, 1 & 2 Geo. 5, c. 46, § 1(2)(d) (1911).
18. Act of May 31, 1790, ch. 15, 1 Stat. 124.
19. U.S. Const. Art. I, § 8, cl. 8.
20. Act of Mar. 3, 1865, ch. 126, 13 Stat. 540.
21. Act of Aug. 24, 1912, ch. 356, 37 Stat. 488.
22. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391.
23. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138.
24. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212.
25. Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541 (1976). The 1976 Act was amended in 1998 to extend the standard copyright term to seventy years following the author's death. *See* §8.1.1, below.

An indisputably utilitarian thread runs through much of the intellectual history of English copyright: Adam Smith's recognition that a limited statutory protection was needed "as an encouragement to the labours of learned men";[26] Jeremy Bentham's observation that "he who has no hope that he shall reap, will not take the trouble to sow";[27] Thomas Babington Macauley's pragmatic case against a proposal in the House of Commons to extend the copyright term from 28 years to 60 years after the author's death;[28] and Samuel Johnson's remark, "No man but a blockhead ever wrote except for money."[29] But a vigorous natural rights strain can also be found in the English literature and in the cases. One notable example is Lord Mansfield's vivid contention, in the great case of *Millar v. Taylor*,[30] that a perpetual copyright existed at common law alongside the limited term of the Statute of Anne, founded on the premise that "it is just, that an author should reap the pecuniary profits of his own ingenuity and labour."[31]

Copyright's intellectual tradition in the United States is similarly mixed. The phrasing of the copyright statute's constitutional source, Congress's power "to promote the progress of science," has a clear instrumentalist ring, as does the language of the House Report on the comprehensive 1909 copyright revision that copyright "is not based upon any natural right that the author has in his writing . . . but upon the ground that the welfare of the public will be served."[32] However, the great bulk of the state copyright statutes that preceded the first national copyright act expressly invoked principles of natural right as their justification, and nineteenth-century American treatises regularly invoked principles of natural justice, not public good, as the rationale for extending copyright protection.[33]

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26. Adam Smith, Lectures on Jurisprudence 83 (1762).
27. Jeremy Bentham, *A Manual of Political Economy*, *in* 3 The Works of Jeremy Bentham 31, 71 (1839) (John Bowring ed., 1962).
28. Thomas Babington Macaulay, Prose and Poetry 731, 733–37 (G. Young ed., 1952).
29. James Boswell, the Life of Samuel Johnson, Volume II, 12 (April 5, 1776) (Everyman's Library 1992).
30. 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).
31. *Id*. at 252. A subsequent ruling by the House of Lords in *Donaldsons v. Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (1774), effectively held that the Statute of Anne displaced the perpetual common law right.
32. H.R. Rep. No. 60-2222 ("To Amend and Consolidate the Acts Respecting Copyright"), at 7 (1909).

    On the economic underpinnings of American copyright law, see generally Goldstein 2005, §1.14; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Leg. Stud. 325 (1989). For a historical overview of economic thought about copyright in England and the United States, see Gillian K. Hadfield, *The Economics of Copyright: An Historical Perspective*, 38 ASCAP Copyright L. Symp. 1 (1989); Arnold Plant, *The Economic Aspects of Copyright in Books*, 2 Economica 167 (1934).
33. *See generally* Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 Harv. L. Rev. 1149, 1211–1214 (1998).

Judged by its results rather than its rhetoric, copyright legislation in the common law tradition historically fails any strict utilitarian measure. While the ideal copyright legislator would, before voting to extend protection to new subject matter or rights, require a showing that the extension is needed as an incentive to continued investment, common law legislatures have in fact regularly, indeed mostly, extended copyright without any empirical showing that authors would produce, and publishers publish, fewer works if the extension were not given. To be sure, common law copyright legislation attends more closely to the delineation of exceptions from exclusive rights than does civil law legislation. But in the main, the practicalities of lawmaking in the common law countries have led to similar results as the philosophical logic of lawmaking in the civil law countries, extending rights into nearly every corner where a work's value can be economically exploited.

§2.2 The Traditions of Author's Right and Neighboring Rights

§2.2.1 Author's Right

As in England, sovereign printing privileges preceded the emergence of author's rights in France, Germany, and elsewhere on the European continent.[34] In France, the printing monopolies ended with the revolution. A 1791 law laid the foundation for French copyright by giving authors an exclusive right to perform their works, and a 1793 law gave authors generally a broad-based right against unauthorized reproduction of their works. Until passage of the 1957 Copyright Act[35] only minor amendments were made to these laws, and for more than a century and a half the accommodation of French copyright law to new reproduction and performance technologies was left almost exclusively to the courts. The 1985 Act, amending the 1957 Act,[36] confronted newer technologies, such as computer programs, and the 1992 Intellectual Property Code codified both copyright and neighboring rights legislation. The Code has been regularly amended to implement relevant E.U. directives and international treaty obligations.

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34. This historical background on the emergence of author's right is drawn from Elizabeth Armstrong, Before Copyright: The French Book-Privilege System 1498-1526 (1990); Ginsburg 1990; Hesse 1990; David Saunders, Authorship and Copyright 75–121 (1992).
35. Law No. 57-298 On Literary and Artistic Property, of March 11, 1957, Journal Officiel de la Republique Française [J.O.] [Official Gazette of France], March 14, 1957, p.2723.
36. Law No. 85-660 On Authors' and Neighboring Rights, of July 3, 1985, Journal Officiel de la Republique Française [J.O.] [Official Gazette of France], July 4, 1985, p. 7495.

In the German territorial states, the system of sovereign printing privileges lasted well into the nineteenth century. The first German copyright legislation was an 1837 Prussian act giving protection, for thirty years after the author's death, against the reproduction of works of science and art. With the establishment of the Second German Reich in 1871, a national copyright act was passed granting copyright to literary works, illustrations, musical compositions, and dramatic works. Following the 1871 Copyright Act, an Act of 1876 extended copyright to graphic and three-dimensional works of art. Acts of 1901 and 1907 respectively added provisions on copyright in literary and musical works and artistic works and photography. The 1965 Act comprehensively revised copyright law in Germany. As in France and the other Member States of the European Union, the German Act has been amended several times to transpose E.U. directives and international treaty obligations. The natural rights strain that is commonly associated with the author's right tradition did not emerge until the latter part of the nineteenth century, by which time copyright laws had been enacted throughout the European continent. The rationale for author's rights is usually traced to the work of Otto von Gierke, who, expanding on Kant's connection of literary creation to the personality of the author, argued for a copyright that rested in the author's control over every aspect, personal as well as material, of his work's exploitation.[37]

Differences over the implications of copyright's capacity to control both the economic and personal aspects of a work led to a philosophical split between the dualist theory of copyright, followed most prominently in France, and the monist theory, followed in Germany. French law separates the author's moral, or personal, right from his economic, or property, right. Where the economic right is alienable and subject to a limited term, and to exemptions and statutory licenses dictated by market realities, moral right is at least nominally absolute—not only perpetual, but also inalienable.[38] German law, following the monist philosophy, fuses personal and economic interests into a single doctrine. Under German copyright law, both personal and economic interests are, like French moral right, at least nominally inalienable[39] and both are, like French economic rights, durationally limited.[40]

Continental author's rights laws—*droit d'auteur* in France, *Urheberrecht* in Germany, *diritto d'autore* in Italy, *auteursrecht* in the Netherlands and Belgium—differ from the copyright laws of the common law tradition more in emphasis than in outcome. Moral right, for example, has sturdier roots in the author's right tradition than in the copyright tradition, but compliance

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37. *See generally* Francis J. Kase, Copyright Thought in Continental Europe: Its Development, Legal Theories and Philosophy 10–11 (1967).
38. *See* §7.6.1 and §10.5.1, below.
39. *See* §7.6.1, below.
40. *See generally* Kerever 1990.

with the Berne Convention's minimum standard for moral right[41] has seeded the common law fields as well.[42] Author's right countries are far less disposed than common law countries to locate authorship and initial copyright ownership in other than flesh-and-blood authors. They have, however, departed from this position in the case of computer programs,[43] and their rules on transfer of ownership will, in some cases, make this a distinction of little consequence.[44] Another doctrinal difference that sets author's right apart from copyright is its talismanic requirement that works must bear the impress of an author's personality. However, the wish to protect such quotidian subject matter as maps, catalogues, and directories, which also characterizes author's right countries, has led in some countries, such as Germany, to an ad hoc lowering of standards for author's right protection,[45] or (for the broad category of databases) to the introduction of *sui generis* protection across the European Union.[46]

Just as natural rights philosophy has infiltrated the copyright laws of the common law tradition, utilitarianism has crept into the author's rights laws of the civil law tradition. Professor Jane Ginsburg's observation that "mixed motives underlay the French revolutionary copyright laws (as well as their U.S. counterparts)" applies with equal accuracy to contemporary continental doctrine generally, as does her observation that "the parliamentary speeches and the texts of the laws themselves attest to a certain tension between authors' personal claims of right and the public interest in access to works of authorship."[47]

In the Member States of the European Union, of which only three (the United Kingdom, Ireland, and Cyprus) belong to the copyright tradition, the harmonization of copyright and neighboring rights law has greatly accelerated the process of convergence between copyright and author's right norms and rationales. The seven directives that the E.U. legislature has produced since 1991 have evened out the main disparities between national laws in the E.U. in important areas, such as computer programs, databases, term of protection, scope of protection, and enforcement, making the prospect of a truly unified European Copyright Law increasingly realistic.[48]

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41. Berne Convention, 1971 Paris Text Art. 6*bis*.
42. *See generally* Chapter 10, below.
43. *See* §7.1, below.
44. *See* §7.6, below.
45. *See* §6.1.2.7, below.
46. *See* §6.2.4, below.
47. Ginsburg 1990, 1014. *See generally* Hesse 1990.
48. *See* §3.3.1, below. *See generally* Van Eechoud et al. 2009.

§2.2.2 Neighboring Rights

At the same time that philosophies of authorial personality and case law on moral right were forging a doctrine of author's right, technologies were beginning to emerge that would challenge the doctrine's assumptions respecting authorship. Photographs, it might be thought, were the products of a mechanical process, not an artist's creative vision; motion pictures were the product of corporate organizations, not the labors of individual authors. After some agonizing, civil law countries brought photographs and films within author's right, but they drew the line there and rejected author's right protection for performances, sound recordings or phonograms, and broadcasts.[49] Instead, they created for these and other new productions a regime of neighboring rights—*droits voisins* in France, *Leistungsschutzrechte* in Germany, *diritti connessi* in Italy, *naburige rechten* in the Netherlands and Belgium.

Protection for performances, sound recordings, and broadcasts is the mainstay of neighboring rights doctrine and the object of the principal neighboring rights treaty, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. This treaty, also called the Rome Convention, has attracted adherents not only from countries, such as France and Germany, that protect these productions under neighboring rights doctrine, but also countries, such as the United Kingdom and Canada, that effectively protect this subject matter under copyright. Although the Rome Convention's minimum standards, including term of protection and scope of rights, are much lower than the standards the Berne Convention prescribes for literary and artistic works, many national laws exceed the convention minima.

The difference between countries that apportion protection between author's right and neighboring rights and countries that bring both classes of subject matter under the rubric of copyright is mainly symbolic. Few sound recordings, performances, or broadcasts that are protected by copyright will in fact enjoy an economic life that begins to approach the copyright term of protection; indeed, their economic value will typically be exhausted even before expiration of the shorter, neighboring rights term of protection.

The main consequential difference between the systems of author's right and neighboring rights, on the one side, and copyright systems, on the other, lies in the international obligations the two approaches entail. If Country *A* defines a form of creative production, such as a performance, phonogram, or broadcast, as being something other than a "literary" or "artistic work," the subject matter will fall outside the country's obligation under the Berne Convention to extend the Convention's minimum standards and national treatment requirement to productions coming from Country *B*. If Country *B*

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49. *See generally* §6.2, below.

defines the very same production as coming within its copyright law as a literary or artistic work, it will be obligated to protect such works originating in Country *A* according to the Berne Convention's minimum standards and national treatment requirements.[50]

§2.3 Copyright as a Human Right

A number of scholars, mostly European, have argued for the elevation of authors' right to the status of a human right.[51] Although the argument has received little encouragement from scholars more comfortable with the utilitarian rationale for copyright, general support for the notion that authors' rights are essentially human rights can be derived from various international treaties and declarations, subscribed to by countries associated with both the civil law and common law traditions. For example, Article 27(2) of the Universal Declaration on Human Rights provides: "Everyone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[52] Similar language can be found in the United Nations Covenant on Economic, Social and Cultural Rights.[53]

Explicit recognition of copyright as a human right in national constitutions is however rare. The U.S. Constitution reveals a utilitarian rather than an authorial conception of intellectual property when it establishes the "progress of science" as the rationale for copyright legislation.[54] In contrast, the Swedish Constitution seems unequivocally to recognize authors' right as a human right by stating that "[a]uthors, artists and photographers shall own the rights to their works in accordance with provisions laid down in law."[55]

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50. *See* §4.2, below.
51. *See, e.g.*, F. Dessemontet, *Copyright and Human Rights*, *in* Kabel and Mom 1998, 113; M. Vivant, *Le droit d'auteur, un droit de l'homme*, 174 R.I.D.A. 60 (1997); A. Kéréver, *Authors' rights are human rights*, 32 Copyright Bulletin 18 (1999); extensively Torremans 2008.
52. Universal Declaration on Human Rights Art. 27(2). *See, e.g.*, France, Huston v. La Cinq, District Court of Paris, November 23, 1988, 139 R.I.D.A. 205 (1989); Anne Bragance v. Olivier Orban et.al., Court of Appeal of Paris, 142 R.I.D.A. 301 (1989).
53. United Nations Covenant on Economic, Social and Cultural Rights Art. 15(1)(c) reads: "The States Parties to the present Covenant recognize the right of everyone: . . . (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."
54. U.S. Const. Art I, § 8, cl. 8. *See also* Philippines, 1987 Constitution of the Republic of the Philippines, Chapter XIV, S. 13: "The State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law."
55. Sweden, Constitution (*Regeringsform*) Chapter 2, Art. 19.

Few E.U. Member States mention copyright or intellectual property rights in their national constitutions,[56] even though the Charter of Fundamental Rights of the European Union (2000) succinctly states that "[i]ntellectual property shall be protected."[57] The European Convention on Human Rights[58] nowhere expressly recognizes copyright or intellectual property as a human right, although, arguably, a fundamental rights basis for copyright may be derived both from the "property clause" of Article 1 of the First Protocol to the ECHR[59] and the "privacy clause" of Article 8 ECHR.[60]

While the Federal German Constitution (*Grundgesetz*) does not mention copyright, case law and doctrine on copyright's constitutional underpinnings are particularly well developed in Germany. Commentators consider the moral rights element, which according to German doctrine is an indivisible part of the ("monistic") concept of copyright, to be protected under Articles 1(1)[61] and 2(1)[62] of the Federal Constitution.[63] Article 14(1),[64] which secures

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56. Besides Sweden, Portugal is a notable exception; *see* Portugal, Constitution Art. 42(2): "[Freedom of cultural creation] includes the right to invention, production, and dissemination of scientific, literary, or artistic works, including legal protection of copyright."
57. Charter of Fundamental Rights of the European Union Art. 17(2), OJ EC C 364/1 of 18 December 2000.
58. European Convention on Human Rights (ECHR), signed in Rome on 4 November 1950.
59. First Protocol to the ECHR, Paris, 2 March 1952, Article 1 reads: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." *See* Laurence R. Helfer, *Intellectual Property and the European Court of Human Rights*, *in* Torremans 2008, 36–43.
60. Article 8 ECHR reads: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." *See* Josef Drexl, *Constitutional protection of authors' moral rights in the European Union—between privacy, property and the regulation of the economy*, *in* Human Rights as Private Law: Privacy and Autonomy 159 (Katja S. Ziegler ed., 2007). *See, e.g.*, Austria, "Media professor," Supreme Court, June 12, 2001, [2002] GRUR Int. 341, at 343 ("protection [of copyright] as a basic and human right is connected to property protection and protection of personality").
61. Article 1(1) of the German Constitution reads: "The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority."
62. Article 2(1) of the German Constitution reads: "Everybody has the right to self-fulfillment in so far as they do not violate the rights of others or offend against the constitutional order or morality."
63. *See* Dietz 2007, 60–61.
64. Article 14(1) of the German Constitution reads: "Property and the right of inheritance shall be guaranteed. Their substance and limits shall be determined by law."

private property subject to the limits set by the law, effectively protects the economic element of German copyright. Article 14(2)[65] expressly recognizes the "social" nature of property, thus arguably providing for a constitutional limit to overbroad copyright protection. In a series of landmark cases initiated by right holders, the Federal Constitutional Court has examined the constitutional validity, in light of Article 14(2), of a number of copyright limitations that permitted the unauthorized use of copyrighted works without compensation for educational and religious purposes.[66] The Court confirmed that the "social" nature of copyright (*Sozialbindung*), in principle, required certain limitations to the right holder's monopoly.

Like most other countries of the civil law tradition, France fails to explicitly provide for a constitutional guarantee of copyright. The status of authors' right as a human right can however be derived from Article 17 of the Declaration of Human Rights and Civil Rights of 1789, which remains an essential part of the French Constitution today. Article 17 characterizes the right of property in general terms, as an "inviolable and sacred right."[67]

Although elevating authors' rights to the level of a human right probably makes author-protective norms in national law or international treaties less vulnerable to political or judicial challenges, connecting copyright to the fabric of human rights inevitably invites the application of competing human rights and fundamental freedoms, such as freedom of expression and right to privacy. If human rights underlie the moral and economic rights that make up copyright, so do the fundamental freedoms that underlie many of the law's limits and limitations.[68] This point is elegantly illustrated by the wording of Article 27 of the Universal Declaration on Human Rights. Where the second paragraph of Article 27 guarantees protection of authorial interests, the first recognizes "the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."[69]

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65. Article 14(2) of the German Constitution reads: "Property entails obligations. Its use should also serve the public interest."
66. *See, e.g.*, *Kirchen- und Schulgebrauch*, German Federal Constitutional Court July 7, 1971, [1972] GRUR 481, 31 BVerfGE 229; *Kirchenmusik*, German Federal Constitutional Court, October 25, 1978, [1980] GRUR 44, 49 BVerfGE 382 (statutory limitations allowing unauthorized use of copyrighted works for educational or religious purposes not deemed unconstitutional, if providing for equitable remuneration).
67. *See* Dietz 2007, 58.
68. *See, e.g.*, France, Constitutional Council, Decision no. 2009-580 of June 10, 2009 ("HADOPI" law requiring termination of Internet accounts of repeat copyright infringers without judicial hearing held to be unconstitutional, because communication freedoms would be unduly compromised, notwithstanding copyright being considered a human right). *See generally* Chapter 11, below.
69. Universal Declaration on Human Rights Art. 27(1).

Although human rights and fundamental freedoms "rank high in the hierarchy of norms,"[70] there is no hierarchy between these norms themselves. In the end, for lawmakers and courts alike, granting human rights status to copyright implies that a similar process of balancing as currently shapes the copyright system needs to be repeated at the higher level of human rights.

70. Christophe Geiger, *The Constitutional Dimension of Intellectual Property, in* Torremans 2008, 115.

CHAPTER
3

The Norms of International Copyright

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The evolution of substantive international copyright norms has generally been in the direction of increased minimum standards, both for protected subject matter and for exclusive rights. The patterns of protection have also become more complex. The norms of copyright and neighboring rights today are embodied in an interlocking network formed by the Berne[1] and Universal Copyright Conventions[2] and the WIPO Copyright Treaty,[3] as well as by the neighboring rights treaties—the Rome,[4] Geneva,[5] and Brussels Conventions[6] and the WIPO Performances and Phonograms Treaty.[7] The substantive and procedural norms of the TRIPS Agreement affect both copyright and neighboring rights.[8]

Institutional norms have changed less than substantive norms. Bilateral, regional, and multilateral treaties continue to be the principal means for international ordering of copyright and neighboring rights. The principles of territoriality,[9] national treatment,[10] and choice of law[11] have long provided the mechanisms for determining jurisdiction and applicable law under the treaties. Although the TRIPs Agreement has put a spotlight on the relationship between copyright and trade, the connection between copyright and trade measures in fact dates at least to the mid-nineteenth century;[12] a country's decision whether, and to what countries, to extend copyright relations has been a trade decision from the start.

§3.1 Copyright Treaties

Whether a private right, assertable in court, can be derived directly from a copyright or neighboring rights treaty, or must instead depend upon legislation implementing the treaty, will turn in any case on the nature of the treaty and the constitutional traditions of the protecting country. Most countries,

1. Berne Convention for the Protection of Literary and Artistic Works, 1971 Paris Text.
2. Universal Copyright Convention, 1971 Paris Text.
3. WIPO Copyright Treaty, Geneva, 1996.
4. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 1961.
5. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Geneva, 1971.
6. Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, Brussels, 1974.
7. WIPO Performances and Phonograms Treaty, Geneva, 1996.
8. Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994.
9. *See* §4.1, below.
10. *See* §4.2, below.
11. *See* §4.4, below.
12. *See* Ladas 1938, 25–26.

including many that follow the civil law tradition, will view treaties as self-executing, a directly applicable source of rights to private parties,[13] at least so long as the treaty rules are capable of having normative effect without implementing legislation. By contrast, countries following the British and Scandinavian constitutional traditions hold that treaties are never self-executing, so that private actions must be founded on domestic legislation that implements the treaty.[14] This difference in national approaches means, for example, that the owner of worldwide rights in a work may, if the work is exploited without the owner's authority in a civil law country like Italy, directly invoke the applicable standards of the Berne Convention while, in a case arising in Canada, which follows the British tradition, the owner's rights will exclusively be measured by the terms of the Canadian Copyright Act.

The U.S. Constitution contemplates that some, but not all, treaties will be self-executing.[15] Courts in the United States weigh several factors to determine whether a treaty is self-executing. If the treaty itself expressly provides for legislative action, this will weigh against direct application;[16] the Berne Convention, for example, provides that "any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention."[17] Also, Senate reservations made in the course of consenting to a treaty may themselves be persuasive on the point that the treaty is not self-executing.[18] It is generally, although not universally, accepted in the United States that the 1971 Paris Act of the Berne Convention, to which the United States adhered in 1989, is not a self-executing treaty.[19]

The fact that a protecting country views a treaty as self-executing does not mean that the treaty text will necessarily control every aspect of a work's exploitation in that country. National laws may in some cases directly protect foreign works, without direction from a treaty.[20] Also, national legislation

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13. *See* Ricketson 1987, 130–131; Wildhaber 1971, 202–221; Geller 1989, 439–440.
14. *See* Ricketson 1987, 131–132; Wildhaber 1971, 190–192; Geller 1989, 439.
15. *See* Henkin 1996, 225–230; Wildhaber 1971, 192–202.
16. *See, e.g.*, United States v. Postal, 589 F.2d 862, 876–77 (5th Cir. 1979) (analyzing whether the Convention on the High Seas is self-executing). *See also* Henkin 1996, 204.
17. *See generally* Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, Appendix to Hearings Before Subcomm. on Patents, Copyright and Trademarks of Sen. Jud. Comm., 99th Cong. 1st & 2d Sess. (May 16, 1985; April 15, 1986).
18. *See* Henkin 1996, 204.
19. Berne Convention, 1971 Paris Text, Art. 36(1). Art. 36(2) of the Paris Act provides, "It is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention."

    Virtually identical language has been construed as indicating that the Paris Convention for the Protection of Industrial Property (1883) is not a self-executing treaty. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298–99 (3rd Cir. 1979) (construing Article 17 of the Paris Convention).
20. *See* § 5.6, below.

may encompass forms of subject matter and extend exclusive rights that are not contemplated by the treaty's minimum standards; remedial provisions, only sparely described in the usual copyright or neighboring rights treaty, will often be more elaborately prescribed in domestic law. In addition to determining whether and in what ways local law augments directly applicable treaty provisions, a copyright claimant should determine in any case whether the country imposed one or more reservations at the time it adhered to the treaty text.

§3.1.1 Bilateral Copyright Treaties

The national copyright laws enacted in Europe over the course of the nineteenth century generally centered on the conditions of national authors and domestic publishing, and if they did not altogether exclude protection for works of foreign nationals, they generally conditioned protection for foreigners on compliance with one or more formal requirements.[21] Some countries, including the United Kingdom, at least partially conditioned protection for works of foreign authors on the work's publication within the territory of the protecting country.[22] The German Copyright Act protected works of German nationals, wherever published, and works of foreign nationals only if published in Germany by a German publisher.[23]

Protection of foreign works served the interests of publishers based in copyright-importing countries no less than it served the interests of publishers based in copyright-exporting countries, particularly when protection was conditioned on local publication. The effect of unauthorized copies of foreign works—French works in Belgium, for example—was to reduce the revenues not only of the foreign authors and publishers, but of the domestic authors and publishers who had to compete with these cheap foreign copies. Consequently both groups had an interest in seeing foreign works protected by copyright in the domestic territory. Conditioning copyright protection on local publication could further level the playing field between foreign and domestic publishers.

Most bilateral arrangements concluded during the first part of the nineteenth century rested on one or another form of reciprocity. In some cases, the treaty required material reciprocity, meaning that Country *A* would protect works originating in Country *B* only if Country *B* gave comparable protection to works coming from Country *A*. In other cases, the treaty required formal reciprocity, meaning that Country *A* would protect works

21. *See* Ricketson 1987, 22–25; Ladas 1938, 17–23.
22. An Act to Amend the Law of Copyright, 5&6 Victoria c. 45, §17, 1842.
23. German Law of June 11, 1871, Art. 61; German Law of January 9, 1876, Art. 20.

originating in Country *B* on the condition that Country *B* gave works originating in Country *A* protection on the same terms it gave works originating in Country *B* (i.e., national treatment).

Most of these early bilateral arrangements were between net copyright-importing countries. The two major copyright exporters, France and the United Kingdom, enjoyed relatively little success in securing foreign protection for works of their nationals through bilateral agreements based on reciprocity. In 1852, France embarked on a radically different tack, extending copyright protection to all foreign works without regard to whether the country in which the work originated would reciprocate with protection for French works. Although the 1852 decree may have been both altruistic and progressive, as is sometimes claimed,[24] it also reflected a fair measure of shrewdness. The decree did not cover the performance of foreign dramas in France, and French protection would in any event be no more extensive than the protection the work received in its country of origin.[25] Also, the decision to allow foreign publishers to collect revenues on French soil may have encouraged their support of bilateral arrangements with France at home. The same year it issued its innovative decree, France entered into a bilateral copyright agreement with Belgium, the largest market for unauthorized copies of French works, and a rapid succession of other bilateral treaties ensued.[26]

The United Kingdom, the other major copyright exporter of the nineteenth century, ultimately enjoyed substantial success in concluding bilateral treaties on the European continent, but not with the United States, the major market for unauthorized copies of English works.[27] The first U.S. Copyright Act[28] extended protection only to works of authors who were citizens or residents of the United States; by its terms, the Act was not to "be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States."[29]

In 1891, under pressure from English publishers as well as from American publishers, the U.S. Congress passed the Chace Act, authorizing protection in the United States of works of citizens or subjects of a foreign state or nation "when such foreign state or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as its own

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24. Ricketson 1987, 20.
25. Ladas 1938, 28–29.
26. Ladas 1938, 29.
27. *See generally* James J. Barnes, Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement, 1815–1854 (1974).
28. Act of May 31, 1790, ch. 15, 1 Stat. 124.
29. Act of May 31, 1790 §5. *See generally*, Arpad Bogsch, the Protection of Works of Foreign Origin, General Revision of the Copyright Law Study No. 20 (1959).

citizens; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may, at its pleasure, become a party to such agreement."[30]

Early presidential proclamations and bilateral arrangements under the Chace Act were issued principally with respect to European countries, including France,[31] Germany,[32] and the United Kingdom.[33] National treatment was the governing principle of these bilateral agreements, which meant that, to qualify for protection, a foreign work had to comply with formal features of U.S. copyright law that were typically absent from foreign law—affixation of copyright notice, registration and deposit of copies, and renewal. The Chace Act also added the so-called manufacturing clause, requiring that books and other specified materials be printed in the United States.[34]

Bilateral copyright treaties, though they established a pattern of international norms for protecting literary and artistic works, were inherently limited. One drawback was that bilateral agreements could vary widely in their terms, requiring publishers to engage in a cumbersome, piecemeal analysis of whether and to what extent a work from Country *A* would be protected in Countries *B*, *C*, and *D*. Other shortcomings stemmed from the fact that many of these agreements included a most-favored-nation clause. As a consequence, levels of copyright protection could shift each time the treaty partner entered into bilateral relations with a new partner.[35] Also, these treaties had brief terms and were subject to denunciation on short notice, with the result, as Stephen Ladas observed, "that authors were continually exposed to the danger of forfeiting protection of their rights."[36]

§3.1.2 The Berne Convention

§3.1.2.1 History

Even before the first bilateral copyright agreement in 1852, French legislators called for a universal law of copyright, invoking the familiar principle of natural right. The universalist movement evolved in and out of France, starting

30. Act of March 3, 1891, ch. 565 §13, 26 Stat. 1106.
31. Bilateral Agreement of July 1, 1891, 27 Stat. 981 (Proclamation No. 3).
32. Bilateral Agreement of April 15, 1892, 27 Stat. 1021 (Proclamation No. 24).
33. Bilateral Agreement of July 1, 1891, 27 Stat. 981 (Proclamation No. 3).
34. Act of March 3, 1891, ch. 565 §3, 26 Stat. 1106. *See generally* U.S. Copyright Office, Report to Subcommittee on Patents, Copyrights and Trademarks of Sen. Comm. on Judiciary and to Subcommittee on Western Hemisphere Affairs of H.R. Comm. on Foreign Affairs (1984).
35. Ladas 1938, 66.
36. Ladas 1938, 67.

with an international Congress of Authors and Artists in Brussels in 1858, attended by delegates of literary societies and universities, as well as by authors, artists, journalists, librarians, and lawyers. The movement gained momentum at an 1878 international literary congress in Paris presided over by Victor Hugo; these meetings also spurred the eventual formation of the Association Littéraire et Artistique Internationale, under Victor Hugo's leadership.[37]

At an 1882 Congress in Rome, the new Association dropped the agenda for a universal copyright law in favor of a conference proposed by the German Publishers' Association, the Börsenverein der Deutschen Buchhändler, devoted to the formation of an international copyright union. The conference, conducted over three days in September 1883 in Berne, Switzerland, produced a treaty consisting of ten articles. A year later, the Swiss government convened the first diplomatic conference on the proposed treaty and, after two more September conferences, delegates produced a final draft of the Convention for the Protection of Literary and Artistic Works.[38] The treaty was signed by ten countries—Germany, Belgium, Spain, France, the United Kingdom, Haiti, Italy, Liberia, Switzerland, and Tunisia—and came into force on December 5, 1887.[39] "Despite this relatively limited membership," Professor Sam Ricketson has observed, "the geographical sweep of the new Union was considerable when account is taken of the colonial possessions of France, Germany, Italy, Belgium, Spain and the UK."[40]

The substantive provisions of the 1886 Berne Act did not depart significantly from the principles already adopted in the bilateral agreements and the national copyright laws on which they rested. Following the approach taken in many of the earlier bilateral agreements, the Berne Act adopted national

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37. The historical background in this and the following paragraph is drawn from Ladas 1938, 71–83; Ricketson 1987, 41–80.
38. The title of the Convention was the product of compromise. According to Stephen Ladas, the French delegation objected to the Convention's working title, "*pour la protection des droits d'auteur*," a term then commonly used in France to define a dramatist's rights in his work's presentation, suggesting instead, "*pour la protection de la propiété littéraire et artistique*." The German delegation opposed the change on the ground that the word "*propriété*" was vexed by contemporary controversies over the nature of the author's right. Following a proposal from the Swiss delegation, the expression "*protection des oeuvres littéraires et artistiques*" was adopted although, according to Ladas, "this was hardly accurate since the Convention purported to protect 'authors' and not 'works.' However, the Conference made it clear that in using this expression it did not intend to take any position on the theoretical controversies relating to the nature of authors' rights. The phrase could be translated in each country by the expression usually employed to designate these rights, such as '*Urheberrecht*,' and 'copyright.'" Ladas 1938, 81–82.
39. Of these ten countries, only Liberia failed to ratify the treaty. Two other countries, Japan and the United States, sent representatives to the final conference. Japan adhered to the Convention 12 years later, the United States 103 years later.
40. Ricketson 1987, 79.

treatment as its pivotal principle;[41] but, like the bilateral agreements, the 1886 Act also carved out an exception for term of protection, subjecting it to a rule of national reciprocity.[42] The only minimum term prescribed in the Act was ten years for translation rights.[43] The Act allowed formalities, such as registration and deposit, of the sort commonly required under national laws at the time, subjecting enjoyment of the prescribed rights "to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work ."[44]

The Berne Act expressly guaranteed two of the three rights that were generally protected under national laws of the time, the rights of translation[45] and public performance.[46] The reproduction right, though regularly protected under national law, did not appear in the 1886 text. One reason may have been that the right "was so much taken for granted that it was not even mentioned."[47] Another possible explanation is that the reproduction right was so variously defined under the different national laws that omission was the only realistic alternative to divisive debates over the form the right should take as a minimum convention standard.

Permanence and universality separate the Berne Text from the bilateral agreements that preceded it, attributes captured in the treaty's creation of a "Union for the protection of the rights of authors over their literary and artistic works."[48] The Union was structured to exist separate and apart from any particular act of the treaty, which means that the treaty could be revised over time to meet changing conditions, yet no Union member would have to adhere to the new act as a condition to retaining a place at the conference table for future revisions. Also, any country could join the Union at any time by adhering to the most recent act of the Convention. Treaty obligations between Union members would be measured by the terms of the particular act or acts to which they adhered.[49]

The 1886 Berne Text made its protection available to authors who were "nationals" of Union countries, whether their work was "published in one of those countries or unpublished."[50] The Act made the work's country of origin important for purposes of applying the rule of comparison of terms and

41. Berne Convention, 1886 Art. II(2).
42. Berne Convention, 1886 Art. II(2).
43. Berne Convention, 1886 Art. V.
44. Berne Convention, 1886 Art. II(2).
45. Berne Convention, 1886 Arts. V and VI.
46. Berne Convention, 1886 Art. IX.
47. Stephen M. Stewart & Hamish Sandison, International Copyright and Neighbouring Rights 103 (2d ed. 1989).
48. Berne Convention, 1886 Art. I.
49. On the coordination of obligations *inter se* of Berne Union members that have adhered to different treaty texts, see §3.1.5, below.
50. Berne Convention, 1886 Art. II(1).

determining compliance with formalities. In the case of published works, the country of origin was the country in which the work was first published;[51] in the case of unpublished works, the country of origin was the country of which the author was a national.[52] The Act defined protected "literary and artistic works" in encompassing terms—"every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of impression or reproduction"[53]—and expressly excluded protection for newspaper or periodical "articles of political discussion" or "news of the day."[54]

The 1908 Berlin Act introduced several important changes. The Berlin Act's prohibition of formalities as a condition to the acquisition, exercise, or enjoyment of copyright[55] at least partially explains the subsequent disinclination of the United States, with its notice, deposit, registration, and domestic manufacturing requirements, to join the Union. The Berlin Act added protection for cinematographic productions as derivative works;[56] photographs had already been added by the 1896 Paris Additional Act.[57] The Berlin Act established a minimum term of protection measured by fifty years after the author's death, subject to the rule of comparison of terms.[58] The 1908 Act also added a qualified right to make recordings of musical works[59] and established the principle that a work's protection in any country of the Union is independent of its protection in its country of origin.[60]

Following the Berne Additional Protocol of 1914, which introduced the reprisal clause presently embodied in Article 6(1) of the 1971 Paris Act,[61] the 1928 Rome Act added the moral rights of attribution and integrity to the Convention's minimum rights,[62] as well as a right to broadcast copyrighted works—"communication of . . . works to the public by radio-diffusion"—which could be subjected to a statutory license under national legislation.[63] The Rome Act also provided that the minimum copyright term for joint works was to be measured from the death of the last surviving author.[64] The 1948 Brussels Act strengthened or clarified several minimum Convention

51. Berne Convention, 1886, Art. II(3).
52. Berne Convention, 1886, Art. II(4).
53. Berne Convention, 1886, Art. IV.
54. Berne Convention, 1886, Art. VII(2).
55. Berne Convention, 1908 Berlin Text, Art. 4(2).
56. Berne Convention, 1908 Berlin Text, Art. 14(2).
57. Berne Convention, Paris Additional Act, 1896 Art. II(1)(B).
58. Berne Convention, 1908 Berlin Text, Art. 7(1),(2).
59. Berne Convention, 1908 Berlin Text, Art. 13.
60. Berne Convention, 1908 Berlin Text, Art. 4(2).
61. Additional Protocol [to the International Copyright Convention on November 13, 1908], signed at Berne, March 20, 1914.
62. Berne Convention, 1928 Rome Text, Art. 6*bis*.
63. Berne Convention, 1928 Rome Text, Art. 11*bis*.
64. Berne Convention, 1928 Rome Text, Art. 7*bis*(1).

rights, including moral right, the adaptation right, and the translation right. Among other changes, the Brussels Act expanded the broadcast right to include television,[65] added works of applied art and industrial design as examples of protected works,[66] and clarified rights in cinematographic works.[67]

When nations such as France, Germany, and the United Kingdom signed the Berne Convention in 1886, they effectively committed their colonies to the Convention's obligations. As these colonies achieved independence starting in the 1950s, they increasingly chafed at the imposition of copyright treaty standards that had effectively been imposed on them by a foreign power. To address these demands, in 1967 the countries of the Berne Union met in Stockholm. A Protocol Regarding Developing Countries, formulated at the Stockholm Conference to reduce the treaty obligations of the former colonies, failed to obtain the required number of ratifications.[68] Subsequent meetings among Union and non-Union countries, including the United States, achieved a compromise between the developed and developing countries embodied in Article 21 and the Appendix to the 1971 Paris Act. The Paris Act also included comparatively less controversial provisions, such as the express inclusion for the first time of the reproduction right as a minimum standard.[69] The Paris Act is the current text of the Berne Convention and entered into force on October 10, 1974.[70]

The United States of America was the single, commercially most important country to remain outside the Berne Union for its entire first century. The United States undertook no copyright relations at all with foreign countries until 1892, when it entered into the first of a series of bilateral copyright

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65. Berne Convention, 1948 Brussels Text, Art. 11*bis*.
66. Berne Convention, 1948 Brussels Text, Art. 2(1), (5).
67. Berne Convention, 1948 Brussels Text, Art. 14.
68. On the history of the Stockholm Conference, see Robert D. Hadl, *Toward International Copyright Revision: Report on the Meetings in Paris and Geneva, September 1970*, 18 Bull. Copr. Soc'y 183 (1970); Charles F. Johnson, *The Origins of the Stockholm Protocol*, 18 Bull. Copr. Soc'y 91 (1970); Irwin A. Olian, Jr., *International Copyright and the Needs of Developing Countries: The Awakening at Stockholm and Paris*, 7 Cornell Int'l L. J. 81, 95–104 (1974); Nora Maija Tocups, *The Development of Special Provisions in International Copyright Law for the Benefit of Developing Countries*, 29 J. Copr. Soc'y, 402, 413–14 (1982).
69. Berne Convention, 1971 Paris Text, Art. 9(1). According to Professor Ulmer, "The difficulty which had previously been encountered was that regulation of the reproduction right would also have to contain provisions on the exceptions permitted by the contracting states. In Stockholm a formula was found whereby the contracting states were reserved the right to permit reproduction in certain special cases, provided that such reproduction neither conflicts with normal exploitation of the work nor unreasonably prejudices the legitimate interests of the author." Eugen Ulmer, *One Hundred Years of the Berne Convention*, 17 I.I.C. 707, 711 (1986).
70. The text of the 1971 Paris Act is summarized at §3.1.2.2, below.

agreements,[71] and 1955, when it adhered to the Universal Copyright Convention. Political pressure to retain formalities such as the domestic manufacturing clause, which were prohibited since 1908 by the Berlin Text, was one reason the United States declined to join Berne. Another reason was the availability to American publishers of the so-called "back door to Berne," enabling them to secure Berne protection by simultaneously first publishing a work in the United States and a Berne Union country,[72] a strategy that provoked the United Kingdom to propose a protocol permitting reprisal in such cases. The protocol, adopted in 1914, is presently embodied in Article 6(1) of the 1971 Paris Act.[73] The United States finally adhered to the Berne Convention on March 1, 1989.

§3.1.2.2 Structure and Substance

i. Conditions of Protection

The 1971 Paris Act prescribes two principal points of attachment that will entitle a work to protection in a Union country other than the work's country of origin: a work will be protected if its author is a national or domiciliary of a member state[74] or, alternatively, if the work is first or simultaneously published in a member state.[75]

Identifying a work's "country of origin" is important under Berne for more than determining whether a point of attachment is required. The Convention's minimum standards do not apply in the country of origin; country of origin also figures importantly in application of the rule of the shorter term under Article 7(8) of the Paris Text and the rule of protection for works of applied art and industrial design under Article 2(7).

In the case of published works, Article 5(4) of the 1971 Paris Act defines "country of origin" as, "in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection,"[76] and "in the case of

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71. *See* §3.1.1, above.
72. *See* §5.1.2.2, below.
73. *See* Ladas 1938, 96.; WIPO 1978, 39–40.
74. Berne Convention, 1971 Paris Text, Art. 3(1)(a),(2). *See* §5.1.2.1, below.
    Comparable provision is made for motion pictures, for which a point of attachment exists if its "maker" has its headquarters, or is domiciled in, a member state. Berne Convention 1971 Paris Text, Art. 4(a). *See* §5.1.2.1, below.
75. Berne Convention, 1971 Paris Text, Art. 3(1)(b). *See* §5.1.2.2, below.
    Comparable provision is made for works of architecture and works incorporated in a building or other structure if the structure is located in a member country. Berne Convention, 1971 Paris Text, Art. 4(b). *See* §5.1.2.1, below.
76. Berne Convention, 1971 Paris Text, Art. 5(4)(a).

works published simultaneously in a country outside the Union and in a country of the Union, the latter country."[77] In "the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union," the country of origin is the country of which the author is a national.[78] Article 5(4)(c) makes special provision for cinematographic works and architectural or other artistic works incorporated in a building.[79]

The Paris Act contains the substance of the requirement introduced in the 1908 Berlin Act that the "enjoyment and the exercise" of copyright "shall not be subject to any formality"[80] and carries forward the bedrock requirement of national treatment that has been present in every Act since the 1886 Act.[81] The rule of national treatment, as augmented by minimum treaty standards and the rule of retroactivity,[82] is, however, subject to any reservations a member country may have made under the Paris Act or under some earlier Act if it has preserved them under the Paris Act.[83] Article 19 underscores that the "Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union."

ii. Subject Matter

The 1971 Paris Act of the Berne Convention describes protectible "literary and artistic works" in the most encompassing terms, as "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression."[84] In addition to the examples listed in Article 2(1)—among them, books, pamphlets, dramatic or dramatico-musical works, musical compositions, cinematographic works, drawings, architecture, photography, and works of applied art—subsections (3) and (5) of Article 2 respectively provide for protection of translations, adaptations, musical arrangements, and other derivative works and collections of literary or artistic works such as encyclopedias and anthologies.

The Paris Act gives member states some leeway in determining conditions for protection. It is, for example, "a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material

77. Berne Convention, 1971 Paris Text, Art. 5(4)(b).
78. Berne Convention, 1971 Paris Text, Art. 5(4)(c).
79. Berne Convention, 1971 Paris Text, Art. 5(4)(c)(i),(ii). *See* §5.1.2.1, below.
80. Berne Convention, 1971 Paris Text, Art. 5(2). *See* §6.1.4.1, below.
81. Berne Convention, 1971 Paris Text, Art. 5(1). *See* §4.2, below
82. Berne Convention, 1971 Paris Text, Art. 18. *See* §8.4, below.
83. Berne Convention, 1971 Paris Text, Art. 30.
84. Berne Convention, 1971 Paris Text, Art. 2(1). *See* §6.1., below.

form."[85] Similarly, it is a matter for local legislation to determine the extent of protection for applied art, designs, and models,[86] and official texts[87] and political speeches and speeches delivered in the course of legal proceedings.[88] The 1971 Act also establishes a categorical rule of nonprotectibility: "The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information."[89]

iii. Ownership and Term

As a rule, the 1971 Paris Act leaves it to national law to determine who qualifies as the author and initial owner of copyright in a literary or artistic work. Nonetheless, there is a widespread belief, most directly reflected in the copyright laws of civil law countries, that only flesh-and-blood creators qualify as authors.[90] Article 15(1) of the Paris Act establishes a presumption, controlling in the absence of contrary national law, that the person whose name appears on the work "in the usual manner" is the work's author, subject to a showing as a matter of law or fact that the person is not the author.[91] Article 14*bis*(2) of the Paris Act creates an elaborate, and largely obscure, framework for determining copyright ownership of cinematographic works.[92]

As a general rule, the Paris Act prescribes a minimum term of protection measured by fifty years from the death of the author[93] and, in the case of joint works, computes the minimum term as fifty years from the death of the last surviving author.[94] The Paris Act prescribes alternative minimum terms for cinematographic works,[95] anonymous and pseudonymous works,[96] and photographic works.[97] Article 7(8)'s rule of comparison of terms provides that, in any case, "the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work."[98]

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85. Berne Convention, 1971 Paris Text, Art. 2(2). *See* §6.1.5, below.
86. Berne Convention, 1971 Paris Text, Art. 2(7). *See* §6.1.2.10, below.
87. Berne Convention, 1971 Paris Text, Art. 2(4). *See* §6.1.3.2 below.
88. Berne Convention, 1971 Paris Text, Art. 2*bis*(1). *See* §6.1.3.2, below.
89. Berne Convention, 1971 Paris Text, Art. 2(8). *See* §6.1.3.1, below.
90. *See* §7.1, below.
91. Berne Convention, 1971 Paris Text, Art. 15(1). *See* §7.1, below.
92. *See* §7.5.2, below. Or 7.5.2.1
93. Berne Convention, 1971 Paris Text, Art. 7(1).
94. Berne Convention, 1971 Paris Text, Art. 7*bis*.
95. Berne Convention, 1971 Paris Text, Art. 7(2).
96. Berne Convention, 1971 Paris Text, Art. 7(3).
97. Berne Convention, 1971 Paris Text, Art. 7(4).
98. *See* §8.3.1, below.

iv. Rights

The Paris Act establishes minimum standards for both moral and economic rights. Article 6*bis* is the pivotal provision on moral rights and provides that "the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[99] The provision imposes a minimum term of protection for the rights of attribution and integrity that is coextensive with economic rights in the work[100] and subjects the "means of redress for safeguarding" these rights to the law of the country where protection is claimed.[101]

The Paris Act prescribes several economic rights, including the rights to reproduce a literary or artistic work in any manner or form;[102] to make adaptations or arrangements of the work;[103] to make cinematographic adaptations and reproductions and to distribute and publicly perform works thus adapted or reproduced;[104] to make translations;[105] to broadcast[106] or publicly recite the work;[107] and, in the case of dramatic, dramatico-musical, and musical works, to perform the work publicly.[108] Article 14*ter* makes optional provision for *droit de suite*.[109]

The Paris Act permits member countries to carve out limitations and exceptions in certain cases, or to replace exclusive rights with a right to equitable remuneration (statutory licensing) in specific circumstances. Article 9(2) encompasses both alternatives in its terse formulation of permitted limitations on the reproduction right: It "shall be a matter for legislation in the countries of the Union to permit the reproduction of such [literary and artistic] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."[110] Most exemptions, such as those for limited educational and press purposes, are left to national legislation, but Article 10(1)'s exemption for quotation from a published work "compatible with fair practice" is mandatory.[111] The Paris Act also provides

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99. *See* Chapter 10, below.
100. Berne Convention, 1971 Paris Text, Art. 6*bis*(2).
101. Berne Convention, 1971 Paris Text, Art. 6*bis*(3). *See* Chapter 12, below.
102. Berne Convention, 1971 Paris Text, Art. 9(1).
103. Berne Convention, 1971 Paris Text, Art. 12. *See* §9.1.3, below.
104. Berne Convention, 1971 Paris Text, Art. 14(1). See §9.1.3, below.
105. Berne Convention, 1971 Paris Text, Art. 8. *See* §9.1.3, below.
106. Berne Convention, 1971 Paris Text, Art. 11*bis*. *See* §9.1.4.3, below.
107. Berne Convention, 1971 Paris Text, Art. 11*ter*(1). *See* §9.1.4.1, below.
108. Berne Convention, 1971 Paris Text, Art. 11(1). *See* §9.1.4.1, below.
109. Berne Convention, 1971 Paris Text, Art. 14*ter*(1),(2). *See* §9.1.2.4, below.
110. *See* §11.1, below.
111. *See* §11.4.1, below.

for equitable remuneration in the case of the broadcasting right[112] and the right to make recordings of a musical work.[113]

§3.1.2.3 Residual Powers and Relations Among Union Members

Article 17 of the Paris Act recognizes a residual power among Union members "to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right." This provision dates to the 1886 Berne Act and, so far as copyright is concerned, effectively validates the censorship power that underlay the sovereign monopolies predating the first copyright laws.[114] Since the overall intention of the Berne Convention is to secure a private right against unauthorized appropriations of literary and artistic works, public censorship measures will not in the usual case contradict these rights. If, however, a claim were made that a government exercise effectively stymied an author's creative freedom, including freedom to exploit a work in the marketplace, Article 17 leaves no doubt that, within its compass, the government measure to preserve public order will prevail. In any event, it seems clear that Article 17 does not constitute authority for the governmental imposition of compulsory licenses.[115]

In 2009, on a complaint by the United States against China,[116] a WTO Panel ruled that Article 4(1) of the Chinese Copyright Law, which barred copyright protection for works the publication and distribution of which are prohibited on the ground of the work's content, violated Article 5(1) of the Berne Paris Act as incorporated by Article 9(1) of TRIPs.[117] Acknowledging that Berne Article 17 gives member countries the right to control "the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right," the Panel concluded that "it cannot be inferred that Article 17 authorizes the denial of all copyright protection in any work,"[118] which was the effective result of the Chinese provision; China was unable to explain "why censorship interferes with copyright owners' rights to prevent third parties from exploiting

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112. Berne Convention, 1971 Paris Text, Art. 11*bis*(2). *See* Chapter 11 below.
113. Berne Convention, 1971 Paris Text, Art. 13(1). *See* §11.4.5, below.
114. *See* §2.1, above.
115. *See* WIPO 1978, 99. "Where the author's consent was required before a work is made publicly available, it should not be possible for a country to override that consent (except, for example, to allow the police to publish or broadcast a photograph of a wanted criminal)."
116. WTO Panel Report, China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS-362/R (January 26, 2009). The Panel also ruled against China's procedures for disposing of counterfeit goods seized at the border.
117. WT/DS 362/R §7.139.
118. WT/DS 362/R §7.127.

prohibited works."[119] Further, in the Panel's view, the provision in question effectively deprived judicial authorities of the full range of enforcement procedures guaranteed by TRIPs Article 41(1).[120]

New Union members may not adhere to any text earlier than the 1971 Paris Act,[121] and the Paris Act contains specific provisions regulating the legal relations with Berne Union members that have adhered to earlier texts of the Convention.[122] Article 20 entitles Union members "to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention." The Paris Act provides for settlement of disputes "concerning the interpretation or application of this Convention" by a proceeding before the International Court of Justice,[123] an unused procedural route that has in any case been eclipsed by the far more effective dispute settlement procedures of the TRIPs Agreement.[124]

Article 6 of the Paris Act, which dates to the 1914 Berne Additional Protocol, entitles Union countries to retaliate against authors who are nationals of non-Union countries but seek to obtain Berne protection through first publication in a Union country, if the non-Union country "fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union." Article 21 and the Paris Act Appendix embody the compromise reached with developing countries in 1971.[125] Articles 22 through 26 provide for the governance and administration of the Union, and succeeding articles cover institutional topics such as the Convention's revision,[126] acceptance and entry into force,[127] and duration and denunciation.[128]

§3.1.3 The Universal Copyright Convention

The central object of the Universal Copyright Convention was to secure multilateral copyright relations between the countries of the Berne Union and the many countries outside the Union that found the Berne Convention's stringent minimum standards incompatible with their domestic law. In addition to the United States, the list included several Latin American countries that had

119. WT/DS 362/R §7.133.
120. WT/DS 362/R §7.179.
121. Berne Convention, 1971 Paris Text, Art. 34.
122. Berne Convention, 1971 Paris Text, Art. 32.
123. Berne Convention, 1971 Paris Text, Art. 33.
124. *See* §3.4.1.2, below.
125. *See* §11.5, below.
126. Berne Convention, 1971 Paris Text, Art. 27.
127. Berne Convention, 1971 Paris Text, Art. 34.
128. Berne Convention, 1971 Paris Text, Art. 35.

already entered into regional copyright treaties, the then Soviet Union, and several African and Asian nations. The steps leading to the Universal Copyright Convention trace back to a *voeu*—wish—adopted at the 1928 Rome Conference of the Berne Union to create a bridge between the Berne Convention and the 1910 Buenos Aires Agreement, the principal Pan-American treaty to include the United States as a party.[129] Efforts to establish multilateral relations between Berne and non-Berne countries, particularly proposals for an entirely new convention separate from Berne, had gained momentum by 1939, only to be cut short by the outbreak of World War II.[130]

A succession of international meetings held under UNESCO auspices, beginning in 1947 and culminating in a 1952 diplomatic conference in Geneva, produced the Universal Copyright Convention signed by 36 states. Mainly to accommodate the United States, the final text allowed member states to impose formalities as a condition of protection and to measure the term of protection from the date of a work's publication rather than from the date of the author's death; it also required neither retroactive protection nor minimum standards beyond the general prescription of "adequate and effective protection."[131] At the same time, to satisfy Berne members, the text provided that the copyright owner's use of a simple form of copyright notice would suffice for foreign works to comply with all domestic formalities.[132]

The Universal Copyright Convention is by its terms independent of the operation of the Berne Convention and, in the event of conflict between the terms of the two conventions, the terms of the relevant Berne text will govern.[133]

The rules of the U.C.C. establishing points of attachment and defining protected subject matter are similar to those of the Berne Convention. Unlike the Berne Convention, however, the U.C.C. does permit member states to impose formalities such as notice, registration, and deposit as a condition to protection, but significantly, in the case of works first published outside the national territory and authored by a nonnational, Article III(1) provides that the state must regard its formal requirements as satisfied if, from the time of first publication, all copies of the work published with the copyright owner's authority bear a prescribed copyright notice.[134]

Article IV of the U.C.C. prescribes a minimum copyright term well below the Berne minimum, measured by the life of the author plus 25 years[135] or, if the protecting country does not compute the copyright term on the basis of

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129. *See* Ladas 1938, 650.
130. *See generally* Ricketson 1987, 842–851; Kupferman & Foner 1955.
131. Universal Copyright Convention, 1952 Geneva Text, Art. I.
132. Universal Copyright Convention, 1952 Geneva Text, Art. III(1).
133. *See* §3.1.5.2, below.
134. *See* §6.1.4.1, below.
135. Universal Copyright Convention, 1971 Paris Text, Art. IV(2)(a).

the author's life, 25 years from publication or registration of the work.[136] In the case of photographic works or works of applied art, the "term of protection . . . shall not be less than ten years for each of said classes of works."[137]

Under U.C.C. Article II's national treatment obligation, contracting states must treat qualifying works no less favorably than they treat the works of their own nationals. In addition, they must as a minimum give these works "adequate and effective" protection and also grant four exclusive rights: reproduction by any means, public performance, broadcast,[138] and translation.[139] At least in the case of the reproduction, performance, and broadcast rights, national legislation may create exceptions from these rights "that do not conflict with the spirit and provisions of this Convention."[140] Under the compromise reached in 1971, developing countries may subject the reproduction and translation rights to compulsory licenses in prescribed circumstances.[141]

In addition to the so-called Berne Safeguard Clause, which aims at discouraging Berne Union countries from giving up Berne membership and joining the U.C.C. instead,[142] the 1971 U.C.C. Paris Act provides that the Convention will not apply to the "relationships among countries of the Berne Union in so far as it relates to the protection of works having as their country of origin, within the meaning of the Berne Convention, a country of the Berne Union"[143] and that it will not "in any way affect" the Berne Convention or membership in the Berne Union.[144]

§3.1.4 The WIPO Copyright Treaty

On December 20, 1996, following three weeks of meetings, representatives of approximately 120 countries participating in a Diplomatic Conference on Certain Copyright and Neighboring Rights Questions adopted the WIPO Copyright Treaty, together with the WIPO Performances and Phonograms Treaty.[145] The steps leading to the WIPO Copyright Treaty date to an autumn 1989 decision by the WIPO Governing Bodies to prepare a possible protocol

136. Universal Copyright Convention, 1971 Paris Text, Art. IV(2)(a).
137. Universal Copyright Convention, 1971 Paris Text, Art. IV(3). *See* §8.1.2.2, below.
138. Universal Copyright Convention, 1971 Paris Text, Art. IV*bis*(1). *See* §§9.1.1 and 9.1.4, below.
139. Universal Copyright Convention, 1971 Paris Text, Art. V(1). *See* §9.1.3, below.
140. Universal Copyright Convention, 1971 Paris Text, Art. IV*bis*(2).
141. Universal Copyright Convention, 1971 Paris Text, Art. V*ter*, V*quater*. *See* §11.5, below.
142. Universal Copyright Convention, 1971 Paris Text, Appendix Declaration Relation to Article XVII.
143. Universal Copyright Convention, 1971 Paris Text, Appendix Declaration Relation to Article XVII.
144. Universal Copyright Convention, 1971 Paris Text, Art. XVII.
145. On the Performances and Phonograms Treaty, *See* §3.2.3, below.

to the Berne Convention. Both the form of the instrument and its objects changed significantly over this brief period.[146] The Diplomatic Conference ultimately addressed not only questions left open since the last revision of the Berne Convention in 1971, but grappled as well with questions raised by digital uses of copyrighted works. The Conference also confronted the new reality of the TRIPs Agreement and confirmed the protectibility of computer programs as literary works within the terms of the Berne Convention.[147]

The WIPO Copyright Treaty is closely connected to the 1971 Paris Act of the Berne Convention. The Copyright Treaty obligates contracting parties to apply Articles 2 through 6 of the 1971 Berne Paris Act *mutatis mutandis* "in respect of the protection provided for in this Treaty."[148] Consequently the Paris Act's provisions on points of attachment,[149] national treatment,[150] and scope of protectible subject matter[151] apply under the WIPO Copyright Treaty. Article 1 of the Treaty states that it is a "special agreement" within the meaning of Article 20 of the Paris Act;[152] that nothing in the Treaty is to derogate from the Contracting Parties' existing obligations under Berne;[153] and that the "Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention."[154]

The WIPO Copyright Treaty expands on three aspects of protectible subject matter under the 1971 Berne Paris Act that had assumed particular significance in the contemporary digital environment: that computer programs are protectible as literary works within the meaning of Article 2 of the Berne Paris Act;[155] that compilations of data or other material "which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such";[156] and that copyright protection "extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."[157] Article 9 of the Copyright Treaty departs from

146. *See generally* R.V. Vaidyanatha Ayyar, *Interest or Right? The Process and Politics of a Diplomatic Conference on Copyright*, 1 J. of World Intellectual Property 3 (1998); Reinbothe et al. 1997.
147. WIPO Copyright Treaty Art 4. A proposed third treaty, on the protection of databases, was postponed for further action. *See generally* Neil W. Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPs Dispute Settlement*, 37 Va. J. Int'l L. 441 (1997).
148. WIPO Copyright Treaty Art. 3. *See generally* Reinbothe et al. 1997.
149. *See* §5.12, below.
150. *See* §4.2, below.
151. *See* §6.1, below.
152. WIPO Copyright Treaty Art. 1(1).
153. WIPO Copyright Treaty Art. 1(2).
154. WIPO Copyright Treaty Art. 1(4).
155. WIPO Copyright Treaty Art. 4. *See* §6.1.2.9, below.
156. WIPO Copyright Treaty Art. 5. *See* §6.1.2.7, below.
157. WIPO Copyright Treaty Art. 2. *See* §6.1.3.1, below.

Berne Article 7(4)'s special treatment of the copyright term for photographs by requiring the standard copyright term of protection for these works.[158]

The WIPO Treaty also provides for a public distribution right;[159] a qualified commercial rental right for computer programs, cinematographic works, and works embodied in phonograms;[160] and a "right of communication to the public," by wire or wireless means, including a right of "making available to the public" which covers online delivery of content on demand.[161] Article 10 requires contracting parties, when creating exceptions to rights granted under the Treaty, or under the Berne Convention, to abide generally by the "three-step test" that Article 9(2) of the Berne Paris Act prescribes for limitations on the reproduction right.[162] The Treaty also directs contracting states to protect against circumvention of encryption technologies for copyrighted works[163] and against interference with electronic rights management information.[164] Finally, it also calls for effective remedies to enforce rights under the Treaty.[165]

§3.1.5 Which Treaty Governs?

If treaty standards were static, it would be easy to answer the questions whether, and to what extent, a particular country will protect a literary or artistic work. But technological change and shifts in the wealth of nations have led over time to shifts in the applicable treaty standards. The Berne Convention, the premier treaty for copyright and author's right, has been revised several times since the first 1886 Act, with each new text attracting some of the original members of the Union, but not others, while also winning newcomers to the Berne club. This historical pattern of Berne adherence requires the copyright owner that seeks protection in another Berne country to determine whether its work will encounter either of two complicating legal facts. First is the situation where the protecting country and the country providing the Berne point of attachment have adhered to different texts of the Berne Convention.[166] Second is the situation particular to the United States, which was a late arrival to the Berne Union, where the United States provides the point of attachment and protection needs to be resolved not just under a

158. *See* §8.1.2.2, below.
159. WIPO Copyright Treaty Art. 6(1). *See* §9.1.2, below. Article 6(2) leaves the question of exhaustion—or first sale—to local law.
160. WIPO Copyright Treaty Art. 7. *See* §9.1.2.2, below.
161. WIPO Copyright Treaty Art. 8. *See* §9.1.4.5, below.
162. *See* §11.1, below.
163. WIPO Copyright Treaty Art. 11. *See* §9.1.6, below.
164. WIPO Copyright Treaty Art. 12.
165. WIPO Copyright Treaty Art. 14(2). *See* Chapter 12, below.
166. *See* §3.1.5.1, below.

Berne text, but under a patchwork of Berne, the Universal Copyright Convention, and a bilateral or regional copyright treaty.[167]

§3.1.5.1 Different Texts of the Berne Convention

Countries that first entered the Berne Union after the effective date of the 1971 Paris Text can adhere only to the Paris Text, and not to any earlier text.[168] By contrast, countries that were already members of the Union in 1971 are under no requirement to adhere to the Paris Text and may limit their international obligations to the level of the latest Berne text to which they have adhered—Brussels (1948), say, or Rome (1928).[169] Where both the protecting country and the country providing the point of attachment have adhered to the Paris Text, the obligations imposed by the Paris Text will control disposition of the work in issue. A different situation arises where the protecting country and the country providing the point of attachment both adhered to an earlier act—the Brussels Act, say—but only the protecting country has also adhered to the Paris Text. In this situation, the protecting country need only extend Brussels-level protection to works with their point of attachment in the other country, since Brussels is the only text the two countries have in common and consequently the only source of privity between them.[170]

A more complicated situation arises when the protecting country, a newcomer to the Berne Union, has adhered only to the Paris Text, while the country providing the point of attachment has adhered only to an earlier—Brussels, say—text. Since, in this situation, no common text binds the two countries, neither has any apparent obligation to protect works with a point of attachment in the other. This situation was the subject of extensive debate in the course of the Stockholm Revision Conference and was ultimately resolved in Article 32 of the 1967 Stockholm Act, as carried forward in the Paris Act.[171] In general, Article 32(2) requires a protecting country that has adhered only to the Paris Text to apply the Paris Text to works with a point of attachment in a country that has adhered only to a previous Berne text. Further, under this provision, Paris adherents "recognize that the said [non-Paris] country of the Union, in its relations with them . . . may apply the provisions of the most recent Act by which it is bound"—the 1948 Brussels Act, in this example—or, subject to one exception, "has the right to adapt the protection to the level provided for by this Act"—that is, the Paris Act.[172]

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167. *See* §3.1.5.2, below.
168. *See* Berne Convention, 1971 Paris Text, Art. 34(l).
169. *See* Berne Convention, 1971 Paris Text, Art. 32(l).
170. *See* Geller 1989, 8–9; Ricketson 1987, 813–814.
171. *See* Ricketson 1987, 814–825.
172. *See generally* Geller 1989, 9; Ricketson 1987, 815–825.

Implicit in Article 32's formulation is the prospect that in the converse situation, where the country providing the point of attachment has adhered to the Paris Text, but the protecting country has not, the protecting country has no obligation to protect the work. According to Paul Geller, "commentary puts forward the view that the senior member, in adhering to the Berne Union, bound itself by the Convention which, at the time of adherence, was to be effective for an unlimited period of time and foreseeably subject to revised Acts to which new junior members would also accede as the Berne Union developed. By implication, the senior member thus obligated itself to protect works from any eventual junior member acceding to any subsequent Berne Act, but only pursuant to the last Act binding the senior member. Thus it would treat newly acceding junior members much like third-party beneficiaries of the earlier Berne Act it signed."[173]

§3.1.5.2 Texts of Different Treaties

The United States adhered to the Berne Convention on March 1, 1989. Before then, the country's only truly multilateral copyright commitment was to the Geneva and Paris Acts of the Universal Copyright Convention, which came into force in the United States on September 16, 1955, and July 10, 1974, respectively. Before the United States adhered to the U.C.C., it was a party to regional inter-American copyright conventions and to a large number of bilateral copyright treaties.[174] This multiplicity of treaties inevitably raises the question of which treaty will govern foreign protection of a U.S. work in any case. Two organizing principles provide the answer—a hierarchical principle that orders treaties according to their primacy, and a chronological principle that orders them over time.

i. The Hierarchical Principle

Of all the treaty sources of protection for literary and artistic works, the Berne Convention is supreme within its domain. Article 18(l) of the Paris Text makes the Berne Convention "apply to all works, which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection."[175] Articles 19 and 20 carve out two exceptions to the Convention's supremacy. Under Article 19, "[t]he provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in

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173. Geller 1989, 10 (footnote omitted).
174. *See* §3.1.1, above.
175. Berne Convention, 1971 Paris Text, Art. 18(l). On the meaning of "country or origin" *see* §8.3.1.2, below.

a country of the Union."[176] Under Article 20, Union members "reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable."[177]

The Universal Copyright Convention is next in the hierarchy of treaties. The U.C.C. expressly subordinates its authority to that of the Berne Convention[178] and effectively makes its provisions coequal with "multilateral or bilateral copyright conventions or arrangements that are or may be in effect exclusively between two or more American Republics."[179] Apart from these provisions, the U.C.C. is in its domain superior to other copyright treaties. Article XIX of the Convention provides that "[t]his Convention shall not abrogate multilateral or bilateral conventions or arrangements in effect between two or more Contracting States"; but, "[i]n the event of any difference between the provisions of such existing conventions or arrangements and the provisions of this Convention, the provisions of this Convention shall prevail." Further, "[r]ights in works acquired in any Contracting State under existing conventions or arrangements before the date on which the Convention comes into force in such State shall not be affected."[180]

The U.C.C.'s framers, with several Berne Union members among them, reconciled competing points in the two treaties and secured the Berne Convention's primacy, by referring in U.C.C. Article XVII to an annexed declaration as "an integral part of this Convention for the States bound by the Berne Convention on 1 January 1951, or which have or may become bound to it at a later date."[181] The Appendix Declaration Relating to Article XVII provides in relevant part that "(c) The Universal Copyright Convention shall not be applicable to the relationships among countries of the Berne Union in so far as it relates to the protection of works having as their country of origin, within the meaning of the Berne Convention, a country of the Berne Union."[182] This means that if a work originated in a Berne Union country—as country of origin is defined by

176. Berne Convention, 1971 Paris Text, Art. 19.
177. Berne Convention, 1971 Paris Text, Art. 20.
178. *See* Universal Copyright Convention, 1971 Paris Text, Art. XVII(1). ("This Convention shall not in any way affect the provisions of the Berne Convention for the Protection of Literary and Artistic Works or membership in the Union created by that Convention.")
179. Universal Copyright Convention, 1971 Paris Text, Art. XVIII.
180. Universal Copyright Convention, 1971 Paris Text, Art. XIX.
181. Universal Copyright Convention, 1971 Paris Text, Art. XVII(2).
182. Universal Copyright Convention, 1971 Paris Text, Appendix Declaration Relating to Art. XVII.

the applicable Berne text[183]—other Berne members are obligated to apply the Berne standards of protection to the work, and not the U.C.C. standards.[184]

ii. The Chronological Principle

The relationship between the multilateral and bilateral treaties is chronological as well as hierarchical. One treaty in the hierarchy may apply at one point in time, while another, lower down the ladder, may apply at another point. *Atlas Film v. Janus Film*,[185] involving the 1892 U.S.-German Copyright Agreement, the Universal Copyright Convention, and the Berne Convention, illustrates the methodology employed in such cases.

Under the facts of *Atlas Film*, plaintiff Janus was successor in interest to the German exploitation rights of several films that Buster Keaton had made in the United States between 1921 and 1928. Upon expiration of the first 28-year term of U.S. copyright, the films' copyright owner (plaintiff's predecessor in interest) failed to renew the copyrights for a second 28-year term. Acknowledging that the films were in the public domain in the United States, plaintiff rested its claim of German copyright on two foundations: the January 15, 1892, bilateral copyright agreement between the United States and Germany and, for some of the films, first publication in Great Britain or Japan, creating a Berne point of attachment in those two Union countries. The court of appeals ruled in the plaintiff's favor on its first argument and consequently did not reach decision on the second point. The German Federal Supreme Court left the court of appeals ruling undisturbed.

The German Federal Supreme Court started its analysis with the terms of the 1892 U.S.-German Copyright Agreement, specifically its provision that "[c]itizens of the United States of America shall enjoy, in the German Empire, the protection of copyright as regards works of literature and art, as well as photographs, against illegal reproduction, on the same basis on which such protection is granted to subjects of the Empire."[186] The provision for national treatment meant that U.S. works, including films, were to receive the same protection as German works, even though the German Copyright Act did not cover films until after the 1892 treaty. National treatment also meant that U.S. citizens enjoyed the same term of protection for their works as

183. *See* §8.3.1.2, below.

184. *See generally* Bogsch 1968, 111–124; Arpad L. Bogsch, *Co-Existence of the Universal Copyright Convention With the Berne Conventions*, *in* Universal Copyright Convention Analyzed 160–163 (1955).

185. Atlas Film & AV GmbH & Co. Verleih u. Vertrieb v. Janus Film und Fernsehen Vertriebsgesellschaft GmbH, German Federal Supreme Court, January 27, 1978 (Case 1 ZR 97/76), 10 I.I.C. 358 (1979).

186. Agreement Between the German Reich and the United States of America Concerning the Reciprocal Protection of Copyrights of January 15, 1892, Art. I.

German citizens: 50 years after the author's death. Since the 1892 treaty nowhere required as a condition to protection in Germany that the work still be protected by copyright in the United States, the German copyright term for the films continued to subsist—Keaton had died in 1966—even though the 28-year U.S. term had long since expired and not been renewed.

The court acknowledged that the Universal Copyright Convention, which first entered into force between Germany and the United States on September 16, 1955, complicated this straightforward analysis of national treatment. The U.C.C., like the U.S.-German Copyright Agreement, measured the term of protection by the law of the protecting country but, in Article IV(4)(a), established the so-called rule of the shorter term:[187] "No Contracting State shall be obliged to grant protection to a work for a period longer than that fixed for the class of works to which the work in question belongs . . . by the law of the Contracting State in which the work has first been published."[188] Thus, if the U.C.C. and its rule of the shorter term applied, the Keaton films would be in the public domain in Germany since their term of protection in the United States, where on the facts before the court they were presumably first published, had long since expired.

A complicating fact in *Atlas Film* was that the U.C.C. had not only a rule of the shorter term but also a rule on the effect of other copyright treaties. U.C.C. Article XIX[189] provides in its first sentence that the "Convention shall not abrogate multilateral or bilateral conventions or arrangements in effect between two or more Contracting States." This presumably left the U.S.-German Copyright Agreement untouched and the German Keaton copyrights consequently intact. However, Article XIX's second sentence provides that "[i]n the event of any difference between the provisions of such existing conventions or arrangements and the provisions of this Convention, the provisions of this Convention shall prevail." This suggested that the rule of the shorter term applied after all and that the film copyrights were in the public domain in Germany.

The court ultimately found the answer in U.C.C. Article XIX's third sentence: "Rights in works acquired in any Contracting State under existing conventions or arrangements before the date on which this Convention comes into force in such State shall not be affected." The court relied on this formulation of the doctrine of acquired rights to conclude that the Keaton films were still protected under German copyright. Specifically, since the German rights in the films, including the right to the then-applicable German term of protection, had been acquired under the 1892 U.S.-German Copyright Agreement, they were unaffected by the U.C.C., which entered into force

187. On the rule of the shorter term generally, see §8.3, below.
188. Universal Copyright Convention, 1971 Paris Text, Art. IV(4)(a).
189. Universal Copyright Convention, 1971 Paris Text, Art. XIX.

decades after the rights were first acquired. Effectively, Keaton and his successors in interest had obtained a vested right in the German term of life-plus-fifty years.[190]

Atlas Film held that rights, once acquired, cannot be legislatively truncated. What effect will a protecting country's subsequent extension of copyright term have on the foreign claimant's acquired rights? The *Atlas Film* court observed that extension of the German copyright term would not operate to benefit an author whose work was in the public domain in its country of origin at the time the extension was enacted in Germany. In 1978 the court ruled in the *White Fang* (*Wolfsblut*) case[191] that Jack London's short story, *White Fang*, was not entitled to the extended life-plus-seventy-year term introduced by the 1965 German Copyright Act, which took effect on January 1, 1969. The work had previously fallen into the public domain in the United States and in Germany by reason of London's death on November 22, 1916, and the 1965 Act was unequivocal about the applicability of the rule of the shorter term.[192]

It seems clear from the *Atlas Film* and *White Fang* decisions that some older U.S. works, whether or not in the public domain in the United States, will, notwithstanding U.C.C. Article XIX, continue to be protected under the life-plus-seventy-year term introduced by the 1965 German Act. The entry into force of the Berne Convention between the United States and Germany on March 1, 1989, effectively superseding the U.C.C., should not change this result. If, as in the *White Fang* case, the work had fallen into the public domain in both the United States and Germany before that date, there is nothing in the Berne Convention to resurrect protection in Germany. But, following the *Atlas Film* analysis, if the German copyright term for the work had not expired before March 1, 1989, German copyright would continue to subsist on the work after that date.

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190. *Cf.* Friedman v. Société Galba Films, Court of Appeals, Paris, April 24, 1974 7 I.I.C. 130 (1976). In *Atlas Film,* it was evidently the court's view that the specific terms of the 1892 bilateral agreement, together with the terms of domestic German law, dictated the finding of acquired rights, for the court rejected as inapposite the argument that other countries that had adhered to pre-U.C.C. bilateral agreements with the United States had applied the rule of the shorter term under Article XIX's second sentence, rather than the doctrine of acquired rights under its third sentence.

191. Tele-Cine Film Produktion GmbH v. Constantin Film GmbH & Oceania Produzioni Internazionali Cinematografiche SRL (*White Fang*), German Federal Supreme Court, Jan. 27, 1978 (Case: I ZR 4/77) 10 I.I.C. 363 (1979).

192. "In this connection, the Court overlooked the fact that, according to Section 143(l) Copyright Act, the extension was already effective as of September 17, 1965." Josef Drexel, *Duration of Copyright Protection Accorded U.S. Authors in the Federal Republic of Germany—Changes Due to the U.S. Accession to the Berne Convention*, 22 I.I.C. 27, 39 (1991). *See also* Eugen Ulmer, *The Term of Protection for Works of American Origin in the Federal Republic of Germany*, 10 I.I.C. 287, 292–293 (1979).

§3.2 Neighboring Rights Treaties

Neighboring rights began to emerge in the first part of the twentieth century with national laws in civil law countries establishing special regimes outside of author's right to protect performing artists, producers of phonograms (phonorecords), and broadcasters—three categories left unprotected by national author's rights laws and the Berne Convention. The spread of neighboring rights legislation was slow. When, in 1961, forty countries signed the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations,[193] commonly referred to as the Rome Convention, most of them had to enact for the first time laws that would fully meet the treaty's requirements.

Performances, phonograms, and broadcasts often implicate copyrighted works and, in its first article, the Rome Convention expressly subordinates neighboring rights to copyright: "Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection."[194] The Rome Convention's hierarchical relationship between copyright and neighboring rights set the pattern for the neighboring rights treaties that followed—the Geneva Phonograms Convention,[195] the WIPO Performances and Phonograms Treaty,[196] and the Brussels Satellite Convention,[197] as well as the neighboring rights provision of the TRIPs Agreement.[198] Although this approach reflects the traditional relationship between copyright and neighboring rights, it also presupposes an impermeable boundary between the subject matter of the two sets of rights that will sometimes be more illusory than real. Phonograms, for example, though the subject of neighboring rights in France, are the subject of copyright in the United States.[199]

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193. *See generally* ILO, UNESCO, BIRPI, Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 10–26 October 1961 (1968).
194. Rome Convention, Art. 1.
195. Geneva Phonograms Convention Art. 7(1) *See* §3.2.2, below.
    According to one study, the first formal proposal for protection of phonogram producers was made at the 1908 Berne Revision Conference in Berlin. Stewart 1983, 202.
196. Art. 1(2). *See* §3.2.3, below.
197. Art. 6. *See* §3.2.4, below.
198. Art. 2(2). *See* §3.4.1, below.
199. *See* §6.2.2, below.

§3.2.1 Rome Convention

§3.2.1.1 History

The question of international protection for neighboring rights first formally arose at the 1928 Rome Conference to revise the Berne Convention.[200] Well before the next revision conference, scheduled for Brussels in 1939, drafts were prepared for an annex to the Berne Convention that would deal not only with rights of performers, phonogram producers, and broadcasting organizations, but also with *droit de suite*.[201] The Brussels Conference was not held until after the war, in 1948. While the Conference agreed on a provision for *droit de suite* in a new Article 14*ter* of the Berne Convention,[202] it took no action on the other proposed rights beyond resolutions calling for member countries to study the issues.[203]

In 1949 three international organizations—BIRPI (the predecessor to WIPO), UNESCO, with responsibility for the U.C.C., and the International Labor Organization, interested in remedying the technological displacement of performers—initiated and coordinated a program of studies and proposed draft conventions on neighboring rights.[204] Meetings convened by the I.L.O. produced draft conventions in Rome in 1951 and Geneva in 1956; in 1957 UNESCO and the Berne secretariat organized a meeting of governmental experts in Monaco. The three organizations convened a meeting at The Hague in 1960 to reconcile the various draft conventions into a single draft, which then became the basis for deliberations at a diplomatic conference in Rome in 1961. The final text of the convention was signed on October 26, 1961, by forty states, not including the United States, and came into force on May 18, 1964.[205]

§3.2.1.2 Protection of Performers

The Rome Convention provides three possible points of attachment for performers: if the performance takes place in another contracting state; if the performance is fixed in a protected phonogram; or, if unfixed, if the performance is included in a protected broadcast.[206] If one of these points of attachment is present, the performer is entitled to national treatment, defined as the

200. *See* WIPO 1981, 3.
201. *See* Ricketson 1987, 870.
202. *See* §9.1.2.4, below.
203. *See generally* Union Internationale Pour la Protection des Oeuvres Littéraires et Artistiques, *Documents de la Conférence Réunie à Bruxelles du 5 au 26 juin 1948* 362–368 (1951).
204. WIPO 1981, 7–9.
205. WIPO 1981, 8–9.
206. Rome Convention Art. 4. *See* §5.5.1.1, below.

treatment given under the domestic law of the protecting country "to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory."[207]

In addition to national treatment, the Convention guarantees minimum rights against the broadcast or communication to the public or fixation of a performance and, if the performance is fixed, against reproduction of the fixation of the performance.[208] However, "once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation," Article 19 provides that the minimum rights of Article 7 shall not apply.[209] Article 14 prescribes a minimum twenty-year term of protection for performances, measured from the date of the performance in the case of unfixed performances, and from the date of fixation in the case of performances fixed in phonograms.

§3.2.1.3 Protection of Producers of Phonograms

The Rome Convention prescribes three possible points of attachment for the protection of producers of phonograms: if the producer is a national of another contracting state; if the phonogram's first fixation of sound was made in another contracting state; or if the phonogram was first published in another contracting state.[210] If a point of attachment is present, the phonogram producer is entitled to national treatment in the protecting country, defined as the treatment the protecting country gives to "producers of phonograms who are its nationals, as regards phonograms first fixed or first published on its territory."[211] In addition to national treatment, phonogram producers are given a right "to authorize or prohibit the direct or indirect reproduction of their phonograms"[212] and a right to equitable remuneration in the case of secondary uses.[213] Article 14 prescribes a minimum term of protection for phonograms of twenty years from the date of fixation.

Article 11 of the Rome Convention provides that if a contracting state conditions protection of performers or phonogram producers with respect to phonograms on compliance with formalities, these formalities may in any case be met by inscription of a prescribed notice on copies of the phonogram or its container.

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207. Rome Convention Art. 2(1)(a). *See* §4.2, below.
208. Rome Convention Art. 7. *See* §9.2.1, below.
209. *See* §7.5.2.2, below.
210. Rome Convention Art. 5(1). *See* §5.5.1.2, below. Under Article 5(3) a contracting state "may declare that it will not apply the criterion of publication or, alternatively, the criterion of fixation."
211. Rome Convention Art. 2(1)(b). *See* §4.2, below.
212. Rome Convention Art. 10. *See* §9.2.2, below.
213. Rome Convention Art. 12. *See* §9.2.2, below.

§3.2.1.4 Protection of Broadcasters

A point of attachment for a broadcasting organization will exist if the organization's headquarters is situated in another contracting state or if "the broadcast was transmitted from a transmitter situated in another Contracting State."[214] National treatment for broadcasting organizations is the treatment the protecting country gives under its domestic law "to broadcasting organizations which have their headquarters on its territory, as regards broadcasts transmitted from transmitters situated on its territory."[215] The minimum rights of broadcasting organizations include the right to fix or rebroadcast their broadcasts and to reproduce certain fixations.[216] Article 14 establishes a minimum term of protection for broadcasts of twenty years from the date of broadcast.[217]

§3.2.1.5 Other Provisions

The Rome Convention allows a contracting state to carve out exceptions for private use, news reporting, teaching or research, and ephemeral fixation by broadcasters,[218] and also to establish the same kinds of limitations it provides under copyright law for literary and artistic works.[219]

The Rome Convention does not apply retroactively.[220] The Convention provides for reservations,[221] withdrawal of reservations,[222] special agreements between contracting states,[223] denunciation,[224] revision,[225] and resolution of disputes between contracting parties before the International Court of Justice.[226] Article 24 requires that, for a state to accede to the Convention, it must, among other conditions, be a party to the Universal Copyright Convention or a member of the Berne Union.

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214. Rome Convention Art. 6(1)(b). *See* §5.5.1.3, below.
    Under Article 6(2), a contracting state "may declare that it will protect broadcasts only if the headquarters of the broadcasting organization is situated in another Contracting State and the broadcast was transmitted from a transmitter situated in the same Contracting State."
215. Rome Convention Art. 2(1)(c). *See* §4.2, below.
216. Rome Convention Art. 13. *See* §9.2.3, below.
217. Rome Convention Art. 14. *See* §8.2, below.
218. Rome Convention Art. 15(1). *See* Chapter 11, below.
219. Rome Convention Art. 15(2). *See* Chapter 11, below.
220. Rome Convention Art. 20. *See* §8.4, below.
221. Rome Convention Art. 16.
222. Rome Convention Art. 18.
223. Rome Convention Art. 22.
224. Rome Convention Art. 28.
225. Rome Convention Art. 29.
226. Rome Convention Art. 30.

§3.2.2 Geneva Phonograms Convention

In theory, Article 10 of the Rome Convention ensuring phonogram producers the right to control the direct or indirect reproduction of their phonograms sufficed as a legal sanction against record piracy. In practice, the Rome Convention fell short of this object. One reason is that the Convention does not require minimum rights against the unauthorized importation or distribution of phonograms, the avenues of piracy that are easiest to monitor and to arrest. Also, through the 1960s, the Rome Convention won fewer than a dozen adherents, in part because a condition to adherence was adherence to the Berne or Universal Copyright Convention as well,[227] and in part because even qualifying countries, such as the United States, faced political obstacles to joining.

Under mounting pressure from the recording industry, WIPO and UNESCO convened a committee of governmental experts in March 1971 to look into the question of international sanctions against record piracy. The committee produced a draft treaty for action at a diplomatic conference in Geneva seven months later. The Phonograms Convention was opened for signature on October 29, 1971, and came into force on April 18, 1973.[228]

Article 2 of the Geneva Phonograms Convention obligates contracting states to protect qualifying phonogram producers "against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public."[229] Article 3 provides that the means for implementing this obligation "shall be a matter for the domestic law of each Contracting State and shall include one or more of the following: protection by means of the grant of a copyright or other specific right; protection by means of the law relating to unfair competition; protection by means of penal sanctions."[230] In other words, unlike the Rome Convention, the Phonograms Convention does not obligate member countries to protect phonogram producers by way of an exclusive right, be it copyright or neighboring right.

Like the Rome Convention, the Geneva Phonograms Convention allows member states to carve out the same kinds of limitations on rights as they permit "with respect to the protection of authors of literary and artistic

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227. Rome Convention Art. 24(2).
228. *See generally* WIPO 1981, 91–93; Gillian Davies, Piracy of Phonograms, 36–43 (2d ed. 1986); Eugen Ulmer, *The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms*, 3 I.I.C. 317 (1972); Stewart 1983, 238–249; A. Kaminstein, *The Phonograms Convention*, 19 Bull. Copr. Soc'y 175 (1972).
229. *See generally* WIPO 1981. *See* §9.2.2, below.
230. *See* §9.2.2, below.

works."[231] As a rule, however, the treaty prohibits compulsory licenses.[232] Article 4 leaves the duration of protection to national law, but adds that "if the domestic law prescribes a specific duration for the protection, that duration shall not be less than twenty years from the end either of the year in which the sounds embodied in the phonogram were first fixed or of the year in which the phonogram was first published."[233]

The Phonograms Convention prescribes two alternative points of attachment. One point of attachment is the phonogram producer's nationality in another contracting state. The other point of attachment is the place of the phonogram's first fixation.[234] Like the Rome Convention,[235] the Phonograms Convention provides that compliance with a single prescribed formality—affixation of notice in the proper form and position—will satisfy any other formalities that domestic law imposes as a condition to protection.[236] The Convention also adopts the Rome Convention's definitions of "phonogram"[237] and "producer of phonograms" and, like the Rome Convention, insulates the rights of authors as well as the rights of performers, phonogram producers, and broadcasting organizations "under any domestic law or international agreement."[238]

§3.2.3 WIPO Performances and Phonograms Treaty

The WIPO Performances and Phonograms Treaty was formulated in 1996 at the same diplomatic conference as the WIPO Copyright Treaty and responds to many of the same issues presented by new electronic media for disseminating creative productions.[239] Just as the WIPO Copyright Treaty draws several of its operative concepts from the Berne Convention, the Performances and Phonograms Treaty draws on elements of the Rome Convention.[240] Like the

231. Geneva Phonograms Convention Art. 6.
232. *See* Chapter 11, below.
233. *See* §8.2, below.
234. Geneva Phonograms Convention Art. 7(4). ("Any Contracting State which, on October 29, 1971, affords protection to producers of phonograms solely on the basis of the place of first fixation may, by a notification deposited with the Director General of the World Intellectual Property Organization, declare that it will apply this criterion instead of the criterion of the nationality of the producer.").
235. *See* §3.2.1.3, above.
236. Geneva Phonograms Convention Art. 5. *See* §6.2.5, below.
237. Geneva Phonograms Convention Art. 1. *See* §6.2.2, below.
238. Geneva Phonograms Convention Art. 7(1).
239. For the background of the WIPO Copyright Treaty, see §3.1.4, above.
240. On the Rome Convention, see §3.2.1, above.

WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty also borrows substantially from the terms of the TRIPs Agreement.[241]

The Performances and Phonograms Treaty prescribes as its point of attachment for protection in a contracting country that the performer or phonogram producer be a national of another contracting country.[242] The Treaty relies for this purpose on the criteria of the Rome Convention: "The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that Convention."[243] The level of protection required by the Performances and Phonograms Treaty is a constrained version of national treatment, obligating each contracting party to give nationals of other contracting parties the treatment it accords its own nationals "with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty."[244]

The Performances and Phonograms Treaty approximates Article 6*bis* of the Berne Convention Paris Act in requiring that performers receive rights of attribution and integrity in their live aural performances or performances fixed in phonograms.[245] This is the first time moral rights have been prescribed for performers in an international agreement.

The Treaty requires that performers receive the economic rights to fix their performances and to broadcast and communicate unfixed performances to the public;[246] to reproduce their performances fixed in phonograms, directly or indirectly;[247] and to distribute performances fixed in phonograms to the public.[248] The Treaty also requires a limited right for commercial public rental of performances fixed in phonograms[249] and a "right of making available . . . fixed performances" that corresponds to the WIPO Copyright Treaty's right of communication to the public and encompasses means by which "members of the public may access them from a place and a time individually

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241. *See* §3.4.1, below.
242. WIPO Performances and Phonograms Treaty Art. 3(1). See §5.5., below.
243. WIPO Performances and Phonograms Treaty Art. 3(2). Note that Rome Convention Articles 4(b) and (c) and 5(1)(b) and (c) extend the application of that Convention to performances taking place in another contracting state and to phonograms first fixed or published in another contracting state.
244. WIPO Performances and Phonograms Treaty Art. 4(1). *See* §4.2, below.
245. WIPO Performances and Phonograms Treaty Art. 5. *See* §9.2.1 and Chapter 10, below.
246. WIPO Performances and Phonograms Treaty Art. 6. *See* §9.2.1, below.
247. WIPO Performances and Phonograms Treaty Art. 7. *See* §9.2.1, below.
248. WIPO Performances and Phonograms Treaty Art. 8(1). *See* §9.2.1, below. Article 8(2) leaves it to the contracting party to determine whether and to what extent it will apply the doctrine of exhaustion, or first sale. *See* §9.1.2.1, below.
249. WIPO Performances and Phonograms Treaty Art. 9. *See* §9.2.1, below.

chosen by them."[250] The Treaty gives phonogram producers comparable rights of reproduction,[251] distribution,[252] rental,[253] and "making available."[254] Article 15 entitles both performers and phonogram producers to equitable remuneration for the use of phonograms for broadcasting or communicating to the public.[255]

Like the WIPO Copyright Treaty, the Performances and Phonograms Treaty employs the "three-step test," borrowed from Article 9(2) of the Berne Paris Act, to calibrate the limitations contracting countries may impose on exclusive rights.[256] Article 17 of the Treaty extends the Rome Convention's minimum term of protection for a performance fixed in phonograms to fifty years from the year of fixation;[257] in the case of phonogram producers, protection lasts for fifty years from the phonogram's publication or, failing publication within a prescribed time, fifty years from the year of fixation.[258] Like the Rome Convention,[259] the Performances and Phonograms Treaty states that its protection is not to affect the protection of copyright in literary and artistic works.[260] It also provides that its terms shall not impair the contracting parties' existing obligations under the Rome Convention.[261]

§3.2.4 Brussels Satellite Convention

In October 1968, the International Bureau for the Protection of Intellectual Property, the predecessor to the World Intellectual Property Organization, convened a conference in Geneva to consider the copyright and neighboring rights aspects of satellite transmissions of radio and television programming.[262] Some of the government experts at the conference believed that a new treaty

250. WIPO Performances and Phonograms Treaty Art. 10. *See* §9.2.1, below.
251. WIPO Performances and Phonograms Treaty Art. 11. *See* §9.2.2, below.
252. WIPO Performances and Phonograms Treaty Art. 12. *See* §9.2.2, below.
253. WIPO Performances and Phonograms Treaty Art. 13. *See* §9.2.2, below.
254. WIPO Performances and Phonograms Treaty Art. 14. *See* §9.2.2, below.
255. WIPO Performances and Phonograms Treaty Art. 15. *See* §9.2.2, below.
256. WIPO Performances and Phonograms Treaty Art. 16. *See* §11.1, below.
257. WIPO Performances and Phonograms Treaty Art. 17(1). *See* §8.2, below.
258. WIPO Performances and Phonograms Treaty Art. 17(2). *See* §8.2, below.
259. *See* §3.2., above.
260. WIPO Performances and Phonograms Treaty Art. 1(2).
261. WIPO Performances and Phonograms Treaty Art. 1(1).
262. The historical background in this and the next paragraph is drawn from Masouyé 1974 and Report of the General Rapporteur, International Conference of States on the Distribution of Programme-Carrying Signals Transmitted by Satellite (Palais d'Egmont, Brussels, 6–21 May 1974), UNESCO/WIPO/CONFSAT/42, summarizing the history of the Brussels Convention and proceedings at the 1974 Brussels Conference that ultimately produced the Convention. Both these sources also provide valuable insights into the Convention's operation.

was unnecessary since the Rome Convention's definition of "broadcasting" could properly be interpreted to encompass satellite transmission.[263] However, other experts argued that the definition did not reach that far and would not in any event cover cable retransmission. Further, the Rome Convention's limited success in winning adherents made it a less-than-effective vehicle for regulating what promised to be an international phenomenon. The government experts also rejected the alternative of revising other international agreements, such as the International Telecommunications Convention,[264] to address the question of protection against satellite transmission.

The experts meeting in Geneva ultimately agreed on the need for a new multilateral treaty to deal with the question of satellite transmission. Following a meeting of government experts convened by UNESCO in 1969, subsequent joint WIPO-UNESCO conferences were held in 1971, 1972, and 1973, and the last of these, in Nairobi, produced the conceptual solution that became the basis for a diplomatic conference in Brussels in 1974. The Nairobi solution was to regulate satellite transmissions as a matter of public international law, obligating member states to comply with regulatory standards rather than investing authors and broadcasters with private rights against unauthorized carriage of signals.[265] The final text of the convention embodying this principle was adopted in Brussels on May 21, 1974.

The Brussels Convention differs from traditional copyright and neighboring rights treaties in most pertinent respects. Article 2 of the Convention protects against distribution of program-carrying signals[266] rather than against

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263. Rome Convention Art. 3 defines broadcasting as "the transmission by wireless means for public reception of sounds or of images and sounds."

    On protection against satellite transmission under the Berne Convention, see Eugen Ulmer, *Protection of Authors in Relation to the Transmission Via Satellite of Broadcast Programmes*, 93 R.I.D.A. 4 (1977).

264. Convention of the International Telecommunications Union (Nice, June 30, 1989).

265. "Retaining the principle of an international statute concerning the distribution of signals and associating this with the essential concept of their intended destination, the Nairobi draft merely calls upon Contracting States to assume the obligation to take all adequate measures to prevent the distribution on the territory of satellite-transmitted signals by distributors for whom these signals are not intended. There was no further question of granting, internationally, exclusive rights of authorization to the broadcasting organizations originating the programmes or—in consequence—to the contributors to those programmes, all of which was made a matter either for national legislation or for contractual negotiations. Rightly or wrongly—once again, only time will tell—this new philosophy was considered to be the one deserving widest support." Masouyé 1974, 48.

266. Article 1(i) of the Brussels Satellite Convention defines "signal" as "an electronically-generated carrier capable of transmitting programmes" and Article 1(ii) defines "programme" as "a body of live or recorded material consisting of images, sounds or both, embodied in signals emitted for the purpose of ultimate distribution."

distribution of the signal's content.[267] This means that a signal will be protected even if its content is unprotected by copyright or a neighboring right. Second, following the Nairobi solution, Article 2 creates an obligation on the part of contracting states but implies no private rights in the protected signals. Third, the "adequate measures" contemplated by Article 2 may include private rights such as national copyright or neighboring rights laws but, according to the Conference Report, may also include penal sanctions, administrative regulations, or combinations of these measures.[268]

Taken together, the Brussels Convention definitions of "signal," "emitted signal,"[269] and "derived signal,"[270] as employed in Article 2(1), extend the required protection from unauthorized interception or distribution to a signal's uplink to the satellite, its storage in the satellite, and its downlink from the satellite.[271] However, by excluding from the treaty's obligation the "distribution of derived signals taken from signals which have already been distributed by a distributor for whom the emitted signals were intended," Article 2(3) effectively withholds liability from anyone who intercepts a terrestrial signal from an intended recipient. The Convention expressly excludes the activities of direct broadcast satellites—"where the signals emitted by or on behalf of the originating organization are intended for direct reception from the satellite by the general public."[272]

The Brussels Satellite Convention leaves to local law the duration of any measure taken under Article 2[273] and creates an exemption from Article 2's

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267. Article 2(1) of the Brussels Satellite Convention provides:
"Each Contracting State undertakes to take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended. This obligation shall apply where the originating organization is a national of another Contracting State and where the signal distributed is a derived signal."

268. Report of the General Rapporteur, International Conference of States on the Distribution of Programme-Carrying Signals Transmitted by Satellite, *in* Records of the International Conference of States on the Distribution of Programme-Carrying Signals Transmitted by Satellite (1977). *See generally* Dittrich 1974.

269. An "emitted signal" or "signal emitted" is "any programme-carrying signal that goes to or passes through a satellite." Art. 1(iv).

270. A "derived signal" is "a signal obtained by modifying the technical characteristics of the emitted signal, whether or not there have been one or more intervening fixations." Art. 1(v).

271. *See* Report of the General Rapporteur, International Conference of States on the Distribution of Programme-Carrying Signals Transmitted by Satellite, *in* Records of the International Conference of States on the Distribution of Programme-Carrying Signals Transmitted by Satellite para. 83 (1977); Dittrich 1974, 62 (stating that the Convention makes it "particularly clear that the obligation not only involves preventing the interception of the beam from the satellite to the earth, but also the interception of the beam from the earth to the satellite. It was pointed out during the conference that the interception of the beam from the earth to the satellite is technically possible by use of a second satellite").

272. Brussels Satellite Convention Art. 3.

273. Brussels Satellite Convention Art. 2(2).

obligation for such activities as carriage of short excerpts from the programs carried by a signal consisting of reports of current events, quotation compatible with fair practice, and certain educational and research uses in developing countries.[274] Article 6 secures copyright and neighboring rights protection from impairment by providing that the Convention "shall in no way be interpreted to limit or prejudice the protection secured to authors, performers, producers of phonograms, or broadcasting organizations, under any domestic law or international agreement."

§3.3 Regional Arrangements

In addition to the growing number of bilateral and multilateral agreements, several important copyright and neighboring rights arrangements have been established at the regional level. Some of these regional arrangements are the result of institutional, economic, or cultural collaborations; an example is the European Union, which has pursued an ambitious program of copyright harmonization since the early 1990s. Other regional treaties include the 1889 Montevideo Treaty and various other copyright arrangements concluded between the countries of the Americas. In Asia and the Pacific region, the Association of South-East Asian Nations (ASEAN) and the Asia-Pacific Economic Cooperation (APEC) are active in the field of copyright norm setting, while in Africa rather detailed copyright standards have been set by the (mainly Francophone) nations that are members of the African Intellectual Property Organization (OAPI).[275]

§3.3.1 The European Union

The institutions of the European Union have, through harmonization directives implemented by member states and interpretative rulings by the European Court of Justice, created a substantial body of copyright norms in the Member States of the European Union[276] and, by implication, throughout

274. Brussels Satellite Convention Art. 4.

275. Note that bilateral and regional trade agreements containing copyright norms are treated in §3.4.2, below.

276. On January 1, 2010, membership of the European Union amounted to 27 states: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Slovakia, Spain, Sweden, and the United Kingdom.

the European Economic Area.[277] Because the word "copyright" appears nowhere in the 1957 Treaty of Rome establishing a European Economic Community,[278] or in the Treaty on European Union signed in Maastricht in 1992,[279] the E.U. legislature derives its legislative competence in this field from the E.C. Treaty's general mandate to establish an internal market by way of approximation (i.e., harmonization) of national laws.[280]

All countries of the European Union belong to the Berne Union, adhere to the Rome Convention, and, through membership in the WTO, are bound by the TRIPs Agreement. On December 14, 2009, the European Union also ratified the WIPO Treaties. As a consequence, European Union rules on copyright and neighboring rights may require member states to offer more, but not less, protection than is required by the relevant international treaties. Moreover, Article 7 of the E.C. Treaty, prohibiting discrimination within the European Community on grounds of nationality, requires member states to offer the same level of protection to all citizens and residents of the E.U., even in situations where discrimination by requiring reciprocity would not violate international copyright and neighboring rights norms.

The landmark decision by the European Court of Justice in the *Phil Collins* case[281] provides an example. The Court held that Article 7 of the E.C. Treaty barred Germany from denying neighboring rights protection to a British national under circumstances in which it would have given protection to a German national.[282] The Court's reasoning in the case effectively supersedes the conditions of reciprocity allowed by the Berne Convention, as for example in the case of *droit de suite* or protection of works of applied art.[283]

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277. The European Economic Area encompasses all Member States of the E.U., as well as Norway, Iceland, and Liechtenstein. Pursuant to Annex 17 No. 9(e) of the E.E.A. Agreement, harmonization directives adopted by the E.U. in the field of copyright and neighboring rights are also binding upon the non-E.U. members of the E.E.A.
278. Treaty of Rome establishing the European Economic Community of 25 March 1957, as amended by the Single European Act of 17 and 28 February 1986, the Treaty on European Union of 7 February 1992, the Treaty of Amsterdam of 2 October 1997, the Treaty of Nice of 26 February 2001, and the Treaty of Lisbon of 13 December 2007, O.J. C 83 of 30 March 2010 (consolidated version). From the date of entry into force of the Treaty of Lisbon, 1 December 2009, the Treaty is renamed "Treaty on the Functioning of the European Union" (Treaty of Lisbon, Art. 2.1).
279. Treaty on European Union of 7 February 1992, as amended by the Treaty of Amsterdam of 2 October 1997, the Treaty of Nice of 26 February 2001, and the Treaty of Lisbon of 13 December 2007, O.J. C 83 of March 30, 2010 (consolidated version).
280. E.C. Treaty, Art. 95.
281. Phil Collins v. Imtrat Handelsgesellschaft GmBh, Joined Cases C-92/92 and C-326/92, 3 C.M.L.R. 773 (1993).
282. For a discussion of the *Phil Collins* decision, see §8.3.3, below. See also Tod's SpA and Tod's France SARL v. Heyraud SA, Case C-28/04, June 30, 2005 [2005] ECR (barring member states from applying Art. 2(7) of the Berne Convention amongst themselves).
283. On *droit de suite*, see §9.1.2.4, below.

The harmonization of the law of copyright and neighboring (related) rights in Europe has occurred in two phases, reflecting different approaches and ambitions of the European legislature.[284] The "first generation" directives have their roots in the Green Paper on Copyright and the Challenge of Technology that was published by the Commission in 1988. The "second generation" of the directive process dates to the 1995 Green Paper on Copyright and Related Rights in the Information Society.

The 1988 Green Paper set out an ambitious harmonization agenda to remove disparities in the laws on copyright and neighboring rights of the member states that might negatively affect the Internal Market, with special focus on emerging information technologies.[285] Much of this work program materialized over the course of the 1990s.

The first European directive in the field of copyright, the Computer Programs (Software) Directive, was adopted in 1991.[286] The Directive created a harmonized framework for the protection of computer programs as literary works, including economic rights and limitations, of which the "decompilation" exception, allowing reverse engineering under strict conditions, was the subject of intense lobbying and heated political debate.[287]

The Rental Right Directive,[288] which followed in 1992, harmonized—and for some member states introduced—rights of commercial rental and lending.[289] Perhaps more important, the Directive established a horizontal harmonized framework for the protection of neighboring ("related") rights of performers, phonogram producers, broadcasting organizations, and film producers at levels well exceeding the minimum norms of the Rome Convention.

Two more directives were adopted in 1993. Departing from the prevailing approach of approximation of national laws, the ambitious Satellite and Cable

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284. J. Reinbothe, A Review of the Last Ten Years and A Look at What Lies Ahead: Copyright and Related Rights in the European Union, paper presented at Fordham International IP Conference, April 2002.
285. European Commission, *Copyright and the Challenge of Technology*, Green Paper, COM (88) 172 final, Brussels, June 7, 1988.
286. Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ No. L 122/42, May 17, 1991. The 1991 Directive has since been repealed and is replaced by Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ No. L 111/16, May 5, 2009.
287. *See* §11.2.3, below.
288. Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ No. L 346/61, November 27, 1992. The 1992 Directive has since been repealed and is replaced by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ No. L 376/28, December 27, 2006.
289. *See* §§9.1.2.2 and 9.1.2.3, below.

Directive[290] sought to achieve a common market for transfrontier satellite services by applying a country-of-origin rule to acts of satellite broadcasting.[291] Under the terms of the Directive, providers of satellite broadcasting services would no longer need to clear rights in all countries where a satellite signal was received; licenses from the relevant right holders in the country of the satellite broadcaster's establishment would suffice. The Directive also introduced a scheme of mandatory collective rights management for acts of cable retransmission.[292] The Satellite and Cable Directive's unique characteristics can be traced to its origin—not in the 1988 Green Paper, but in an earlier 1984 Green Paper on Television without Frontiers,which dealt primarily with broadcasting regulation and eventually resulted in the Television without Frontiers Directive of 1989.[293]

The Term Directive, also adopted in 1993, harmonized the term of protection of copyright at the relatively high level of seventy years *post mortem auctoris* and set the duration of neighboring rights at fifty years.[294]

The Database Directive, adopted in 1996,[295] created a two-tier protection regime for electronic and non-electronic databases. On one tier, member states were directed to protect databases as intellectual creations under copyright. On the second tier, they were to provide for a *sui generis* database right to protect the contents of a database that, though nonoriginal, were the object of substantial investment by the producers.

In 2001, the Resale Right Directive was finally adopted after just barely surviving its perilous journey between the Commission, the European Parliament, and the European Council.[296] The Directive harmonizes—and for several member states such as the United Kingdom and the Netherlands that initially

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290. Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ No. L 248/15, October 6, 1993.
291. *See* §4.4.1.2, below.
292. *See* §9.1.4.4, below.
293. European Commission, *Television without Frontiers*, Green Paper, COM (84) def, Brussels, June 14, 1984 [Green Paper on Television Without Frontiers]. Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, Official Journal L 298/23, October 17, 1989.
294. Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ No. L 290/9, November 24, 1993. The 1993 Directive has been repealed and is replaced by Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L372/12 (Dec. 27, 2006). *See* Chapter 8, below.
295. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ No. L 77/20, March 27, 1996.
296. Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ No. L 272/32, October 13, 2001.

opposed the Directive, introduced—*droit de suite,* i.e., a right to compensation for visual artists and sculptors for the resale of the originals of their creations.

The Commission's original work program, as set out in the Green Paper of 1988, was completed with the adoption in 2004 of the Enforcement Directive, providing for harmonized remedies against piracy and other acts of infringement of copyright, neighboring rights, and various other intellectual property rights.

Midway through the 1990s, the European Commission's harmonization agenda became more ambitious as the emergence of the Internet (or "Information Society"), promising seamless transborder information services, brought a new urgency to the harmonization process. The seminal document was the 1995 Green Paper on Copyright and Related Rights in the Information Society.[297] Simultaneously, ongoing discussions at WIPO on a "Protocol" to the Berne Convention accelerated, leading to the conclusion of the WIPO "Internet Treaties" in 1996—the WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty.[298] The two treaties were signed by the Commission on behalf of the European Union, reflecting a commitment to implement the new international norms in a harmonized fashion.

In the end, the scope of the Directive on Copyright and Related Rights in the Information Society, first proposed in 1997 and eventually adopted in 2001,[299] was considerably broader than the original "digital agenda." While the Directive harmonized the basic economic rights (rights of reproduction, communication to the public, and distribution) in a broad and supposedly "Internet-proof" manner and also introduced special legal protection for digital rights management systems, the largest part of the Directive deals with statutory exceptions, a subject never before addressed in any of the European Commission's Green Papers.

In many cases, the harmonized norms of copyright and related rights in the seven directives exceed the minimum standards of the Berne and Rome Conventions and the TRIPs Agreement, to which all the member states have adhered. More often than not, the norms also exceed the average levels of protection granted by the member states prior to implementation; one example is the Term Directive that harmonized the duration of copyright at a level well above the Berne term of life-plus-fifty years, which all member states, except Germany, Spain, and, to a certain degree, France, previously applied.

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297. European Commission, *Copyright and Related Rights in the Information Society*, Green Paper, Brussel, July 19, 1995, COM(95) 382 final.
298. *See* §§ 3.1.4 and 3.2.3, above.
299. Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ No. L 167/10, June 22, 2001.

§3.3.2 Inter-American Copyright Agreements

Well into the twentieth century the countries of North and South America preferred regional copyright arrangements over multilateral arrangements, and the great majority of countries in the region of the Americas declined to join the Berne Union in its first several decades. Haiti, which signed the 1886 Berne Text, withdrew from the Union in 1943. Brazil, the next country from the region to join the Berne Union, did so only in 1922. Canada joined in 1928.[300]

The first of the American regional copyright treaties was the 1889 Montevideo Treaty. Although based in part on the Berne Convention, this treaty departed from the national treatment principle by providing that a work would be protected in any treaty country according to the law of the work's country of origin. Unlike the American copyright treaties that followed, the Montevideo Treaty was open to adherence by countries outside the Americas.[301] Subsequent treaties included the 1911 Caracas Convention, the 1908 Washington Treaty among Central American republics, and, beginning in 1902, a series of Pan-American Conventions modeled after the Berne Convention.[302] The third Pan-American Convention, concluded in Buenos Aires in 1910, drew the largest number of adherents, including the United States and Brazil. The last Pan-American Convention was concluded in Washington in 1946.[303]

Regional copyright arrangements also exist among countries in Latin America. The Andean Community, commonly called the Andean Pact and modeled after the European Community, was formed in 1969 by Bolivia, Chile, Colombia, Ecuador, and Peru.[304] The Community has adopted common standards of intellectual property protection, including copyright, generally consistent with TRIPs standards, and most of the business of the Andean Community's judicial branch, the Andean Community Court of Justice, consists of intellectual property cases, although primarily trademark and patent cases from national courts, rather than copyright cases.[305]

The Universal Copyright Convention was the first treaty to succeed in establishing multilateral copyright relations between the countries of the Americas and the rest of the world.[306] The U.C.C., along with the Berne Convention and the TRIPs Agreement, have superseded most international

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300. *See generally* Harry G. Henn, *Interrelation Between the Universal Copyright Convention and the Pan-American Copyright Conventions*, *in* Kupferman & Foner 1955, 125.
301. *See generally* Ladas 1938, 635–637.
302. *See generally* Ladas 1938, 637–650.
303. *See* Ladas 1938, 644–645.
304. Current members of the Andean Community are Bolivia, Columbia, Ecuador, and Peru.
305. *See generally*, Laurence R. Helfer, Karen J. Alter & M. Florencia Guerzovich, *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 103 Am. J. Int'l L. 1 (2009).
306. *See* §3.1.3, above.

copyright relations based on the Pan-American and other American regional conventions. However, gaps persist for which it is necessary to navigate these treaties' tangled web to determine whether, and to what extent, copyright protection exists for a work originating or infringed in one of the countries of the Americas.[307] In the case of works created or published before the operative date of the relevant country's adherence to the U.C.C., the Berne Convention, or the TRIPs Agreement, determination of rights may entirely depend upon an analysis of one or more of the regional American treaties.[308]

§3.3.3 Other Regional Arrangements

The Association of South-East Asian Nations (ASEAN), established in 1967 by Indonesia, Malaysia, Philippines, Singapore, and Thailand[309] to encourage economic, social, and cultural programs in the region, has provided a collaborative vehicle for member countries to conform their intellectual property laws to TRIPs standards. Apart from this, intellectual property cooperation in ASEAN has centered mostly on patent and trademark laws; copyright norms, other than those dictated by TRIPs, differ materially from country to country particularly in connection with exemptions from rights.[310] In the case of the Asia-Pacific Economic Cooperation (APEC), the 1995 Osaka Action Agenda outlined general objectives, set guidelines, and specified actions to be taken by APEC members in individual areas of interest affecting intellectual property.[311] Collective action concerning intellectual property includes "the deepening of dialogue on intellectual property rights," the international harmonization of intellectual property rights, and the establishment of "appropriate protection" for intellectual property in "new fields," such as electronic

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307. On inter-American treaties, and relations under them, see Organization of American States, Copyright Protection in the Americas (1984). *See also* Alfred L. Rinaldo Jr., *The Scope of Copyright Protection in the United States Under Existing Inter-American Relations: Abrogation of the Need for U.S. Protection Under the Buenos Aires Convention by Reliance on the U.C.C.*, 22 Bull. Copr. Soc'y 417 (1975).
308. On the methodology to be employed when more than one treaty applies to a particular work, see §3.1.5, below.
309. The original members have since been joined by Brunei, Vietnam, Laos, Myanmar, and Cambodia.
310. *See* Assafa Endeshaw, *Harmonization of Intellectual Property Laws in ASEAN: Issues and Prospects*, 2 J. World Intell. Prop. 3, 17 (1999).
311. The Asia-Pacific Economic Cooperation was established in 1989 and currently has 21 members, including Canada, China, Japan, Mexico, Russia, Singapore, and the United States. APEC's work concentrates on three areas: trade and investment liberalization, business facilitation, and economic and technical cooperation.

commerce.[312] The APEC Intellectual Property Rights Experts' Group focuses on anticounterfeiting and antipiracy initiatives.[313]

The African Intellectual Property Organization (OAPI, after the acronym for Organisation Africaine de la Propriété Intellectuelle) has its origins in a 1962 agreement at Libreville among 12 Francophone countries to create a single industrial property authority to act as the national patent office for each signatory country. OAPI itself took form at a 1977 revision conference at Bangui with expanded membership; all but two of its members are Francophone.[314] A version of the Bangui Agreement aimed in significant part at conforming OAPI standards to TRIPs norms came into force in 2002.[315] Annexes to the Revised Bangui Agreement prescribe substantive intellectual property norms for member countries, and Annex VII dealing with literary and artistic property prescribes, among other minimum standards for the protection of authors' rights and neighboring rights, moral rights,[316] *droit de suite*,[317] and a term of protection for economic rights of seventy years *post mortem auctoris*.[318] By contrast, the African Regional Industrial Property Organization (ARIPO), created principally among Anglophone countries, is concerned exclusively with industrial property law.

§3.4 Trade Arrangements

International copyright and international trade are inextricably linked. Any time one country undertakes, within its borders, to protect works originating in another country, it makes an at least implicit calculation of the decision's implications for its balance of trade. Through the latter part of the twentieth century, intellectual property emerged as a specific target of the trade process, from the harmonization agendas of regional blocs such as the European

312. The Osaka Action Agenda, Part One, Section C, point 7.

313. *Ibid.* Intellectual Property Rights Experts' Group. *See generally* Christoph Antons, Michael Blakeney & Christopher Heath, Intellectual Property Harmonisation within ASEAN and APEC (2004).

314. Current members of OAPI are: Benin, Burkina Faso, Cameroon, Central Africa, Congo, Cote d' Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Mauretania, Niger, Senegal, Chad, and Togo.

315. *See generally* Enyinna S. Nwauche, *An Evaluation of the African Regional Intellectual Property Rights Systems*, 6 J. World Intell. Prop. 101, 104–105 (2003).

316. Annex VII Revised Bangui Agreement, Article 8.

317. Annex VII Revised Bangui Agreement, Article 10.

318. Annex VII Revised Bangui Agreement, Article 22. For a detailed study of rights in audiovisual works among OAPI member countries, see Laurier Yvon Ngombé, *Audio-visual Work in the Members States of the African Intellectual Property Organization (OAPI)*, 9 J. World Intell. Prop. 445 (2006).

Community,[319] to unilateral threats of trade sanctions, most notably by the United States, as a vehicle for persuading economically less developed trading partners to adopt and enforce intellectual property laws.[320]

The Agreement on Trade-Related Aspects of Intellectual Property Rights, concluded at Marrakesh on April 15, 1994, as part of an extensive package of WTO Agreements, exemplifies the perceived advantages of the trade process in resolving differences over intellectual property protection.[321] One advantage is flexibility, the capacity to link demands for stronger protection in copyright-importing countries to demands from those countries that the economically more developed countries give them reciprocal concessions on textile, apparel, or agriculture exports. A second advantage is that a broad trade agenda covering many if not most aspects of a nation's economic life can justify the nationwide strengthening of judicial enforcement institutions in ways that a treaty dealing only with copyright or neighboring rights could not. Finally, trade sanctions are characteristically effective. Where the copyright and neighboring rights treaties leave to local courts the interpretation and enforcement of treaty terms, nominally subject to review by the International Court of Justice, the 1994 WTO Understanding on Rules and Procedures Governing the Settlement of Disputes promises that local decisions departing from TRIPS norms will be subject to scrutiny by qualified panels subject to ultimate review by the Dispute Settlement Body.[322]

But the linkage of international intellectual property protection and international trade has also come at a price. Connecting the norms of copyright to the principles of international trade law exposes the noneconomic (mainly cultural and social) foundations that partly underlie the copyright and the author's right traditions to the risk of erosion. Second, prescribing for developing nations levels of intellectual property protection tailored to the economics of more developed nations may in some cases impose too great a burden, particularly in developing nations at the lowest end of the economic scale with only fledgling creative industries and limited legislative and judicial resources.

The WTO Agreements have been followed in more recent years by a large number of bilateral or regional trade agreements containing minimum standards of intellectual property rights protection. In many cases, such as the Free Trade Agreements concluded by the United States with its main trading partners, such arrangements set (so-called "TRIPs-plus") standards higher than the TRIPs minima.

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319. *See* §3.3.1, above.

320. *See generally* Michael Ryan, Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property 73–85 (1998).

321. On the TRIPs Agreement generally, see §3.4.1, below.

322. *See generally* Paul Edward Geller, *Can the GATT Incorporate Berne Whole?*, 12 E.I.P.R 423 (1990); J.H. Reichman, *Intellectual Property in International Trade: Opportunity and Risks of a GATT Connection*, 22 Vand. J. Transnat'l L. 747, 861 (1989).

§3.4.1 TRIPs Agreement

§3.4.1.1 History

A stalemate in efforts by economically developed countries to increase the minimum standards of the Berne Convention and other intellectual property treaties, together with mounting frustration over weak enforcement measures, led in the closing days of the GATT Tokyo Round in 1979 to an ultimately unsuccessful initiative from the European Community and the United States to obtain an "Agreement on Measures to Discourage the Importation of Counterfeit Goods." Behind this initiative, and more successful efforts to put intellectual property on the agenda of the ensuing Uruguay Round, was the belief that the trade process could extract concessions on high minimum standards from countries otherwise disposed to resist them, and that the GATT dispute settlement process could inject rigor into international intellectual property enforcement.

In February 1982, just over two years after conclusion of the Tokyo Round, the United States proposed a work program to examine issues, including commercial counterfeiting, left unresolved by the Tokyo Round. A November 29, 1982, GATT Ministerial Declaration issued a call for examination of the counterfeit goods issue,[323] and a group of experts was appointed to examine the matter in 1984.[324] At the same time, the European Community proposed that senior officials meet to discuss whether to launch a new GATT round. The GATT Council's first formal discussion of a new round took place in June 1985.

On September 20, 1986, a Special Session of the Contracting Parties to the GATT in Punta del Este, Uruguay, attended by representatives from over seventy countries, formally launched the Uruguay Round of GATT. The Ministerial Declaration on the Uruguay Round identified the negotiating objective for intellectual property: "In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines. Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT. These negotiations shall be without prejudice to other complementary initiatives

323. *See* David Hartridge and Arvind Subramanian, *Intellectual Property Rights: The Issues in GATT*, 22 Vand. J. Transnat'l Law 893, 897 (1989).
324. *Id.*

that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters."[325]

Australia's proposal that the standards of protection embodied in the Berne, Rome, Geneva, and Paris Conventions be incorporated into the TRIPs Agreement represented the view favored by the economically developed countries.[326] India's proposal that negotiations be limited to practices that distort international trade, that principles of national treatment and most-favored-nation treatment should apply only to material goods, and that developing nations should receive more favorable treatment in the area of patents and trademarks represented the views of many developing countries.[327]

By the time the "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" was presented on December 20, 1991, the principles of national treatment and most-favored-nation treatment had been retained in the TRIPs Agreement, and protection of computer programs had been assimilated to protection of literary works under the terms of the Berne Convention.[328] Yielding to strenuous objections from the United States, the Agreement expressly excluded the Berne Convention's moral rights obligations from the obligations enforceable under the TRIPs Agreement.[329] The Agreement specified extensive remedies including measures for interdicting infringing goods at national borders,[330] and it made concessions to developing and least developed country members in the form of an extra four years' and ten years' leeway, respectively, from the date of entry into force of the Agreement Establishing the WTO, to bring their intellectual property laws into compliance with all but a prescribed handful of TRIPs standards.[331] The Agreement on Trade-Related Aspects of Intellectual Property Rights was signed at Marrakesh, Morocco, on April 15, 1994.

§3.4.1.2 Dispute Settlement

One shortcoming of the Berne Convention is its lack of an effective mechanism to enforce compliance with the treaty's minimum standards. With the incorporation of Berne's minimum standards in the TRIPs Agreement and the WTO Agreement's creation of a comprehensive system for dispute settlement between member countries, set out in the Understanding on Rules and

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325. Statement by the Chairman, GATT: Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations (Sept. 20, 1986), 25 I.L.M. 1623, 1626.
326. *See* Terence P. Stewart, The GATT Uruguay Round: A Negotiating History (1986–1993) 2270–2272 (1993).
327. *Id*. at 2271.
328. *Id*. at 2288–2289.
329. *Id*.
330. *Id*. at 2310.
331. *Id*. at 2283–2284.

Procedures Governing the Settlement of Disputes in Annex 2, effective dispute resolution procedures now exist for the first time in copyright as well as other international intellectual property relations. The Understanding on Dispute Settlement (DSU) replaces earlier, less formal GATT dispute resolution mechanisms with a systematic adjudicatory procedure, including appellate review and effective economic sanctions.

Under the DSU, a WTO member that believes that another member has breached its obligations under the Agreement will initiate consultations with the offending member.[332] If consultations fail, the parties may pursue mediation, good offices, or conciliation within the WTO[333] or, alternatively, proceed directly to the panel phase in which the Dispute Settlement Body (DSB), charged with administering WTO dispute settlement, will form a panel of three—or, where the parties agree, five—members to hear the dispute and establish the panel's terms of reference.[334] Following hearings and deliberations, the panel will submit its report to the DSB, and the report will then be automatically adopted, unless the DSB decides against adoption, or unless a party seeks review, limited to issues of law, by the seven-member Appellate Body.[335] A report from the Appellate Body is similarly subject to automatic adoption by the DSB, unless the DSB makes a consensus decision against adoption. If the member is found to be in breach of its obligations and fails to conform to the required standard within a "reasonable amount of time," the complaining member may request negotiations for compensation and, if those fail, may request the DSB to authorize appropriate retaliatory measures.[336]

One prominent copyright dispute resolved by a WTO Panel involved a 1999 complaint filed by the E.C. and E.C. Member States against the United States, alleging that section 110(5) of the U.S. Copyright Act violated applicable Berne and TRIPs standards. The 2000 WTO Panel decision is discussed at length below.[337] In 2009, on a complaint by the United States against China,[338] a WTO Panel ruled that Article 4(1) of the Chinese Copyright Law, which effectively denied copyright protection to prohibited works, violated Article 5(1) of the Berne Paris Act as incorporated by Article 9(1) of TRIPs.[339] Addressing another part of the complaint, the WTO Panel ruled that the United States failed to

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332. WTO Agreement, Annex 2 Art. 4.
333. WTO Agreement, Annex 2 Art. 5.
334. WTO Agreement, Annex 2 Arts. 6–8.
335. WTO Agreement, Annex 2 Arts. 12–18.
336. WTO Agreement, Annex 2 Arts. 19–22.
337. *See* §11.1, below.
338. WTO Panel Report, China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS-362/R (January 26, 2009). The Panel also ruled against China's procedures for disposing of counterfeit goods seized at the border.
339. WT/DS 362/R §7.139.

establish that China's thresholds for criminal prosecution of copyright piracy and trademark counterfeiting violated TRIPs Article 61.[340]

§3.4.1.3 Conditions for Protection

Article 1(3) of the TRIPs Agreement obligates WTO members to "accord the treatment provided for in this Agreement to the nationals of other Members"[341] and provides that, with respect to the "relevant intellectual property right"—copyright, for example, or neighboring rights—"nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for" in the appropriate treaty—the Berne Convention, for example, or the Rome Convention.

Article 3 of the TRIPs Agreement adopts national treatment as its principle of protection, subject to the exceptions provided in the Berne and Rome Conventions, as well as in the Paris Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.[342] However, in the case of performers, phonogram producers, and broadcasting organizations, "this obligation only applies in respect of the rights provided under this Agreement."[343] For example, since the TRIPs Agreement does not give phonogram producers a right against the broadcast of their phonograms, WTO members that grant such a right to phonogram producers are not obligated to extend this protection to nationals of other WTO members. This exception does not, however, constitute an exemption from national treatment for rights that local law may characterize as "copyright" but are in substance "neighboring" or "related" rights.

§3.4.1.4 Subject Matter, Ownership, and Term

Article 9 of the TRIPs Agreement, obligating members to comply with Articles 1 through 21 of the Berne Convention's Paris Act, presumably requires them to protect all forms of "literary and artistic works," including "every production in the literary, scientific and artistic domain," and not only the examples

340. The WTO US-China decision is discussed at §3.1.2.3, above

341. Footnote 1 to Article 1(3) states: "When nationals are referred to in this Agreement, they shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory."

342. TRIPs Agreement Art. 3(1). On national treatment under the TRIPs Agreement and in copyright and neighboring rights treaties generally, see §4.2, below.

343. TRIPs Agreement Art. 3(1). Article 3(1) further provides: "Any member availing itself of the possibilities provided in Article 6 of the Berne Convention and paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights."

listed in Article 2 of the Convention.[344] To these classes of protectible subject matter, Article 10 of the TRIPs Agreement adds that "[c]omputer programs, whether in source or object code, shall be protected as literary works under the Berne Convention,"[345] and that "[c]ompilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such."[346] The TRIPs Agreement does not, however, prescribe *sui generis* protection for databases, as does the E.U. Database Directive.[347] Article 9(2) expresses the traditional principle that has long been a norm of international copyright protection: "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."[348]

The TRIPs Agreement provides that in the case of works, other than photographs and applied art, for which the term of protection is calculated on a basis other than a natural life, the term shall be no less than fifty years from the year of publication or, if the work is not published within fifty years, then fifty years from the year it was created.[349] The Agreement requires a minimum of fifty years' protection for performers and phonogram producers, measured from the year in which the underlying performance or fixation occurred, and a minimum twenty-year term for broadcasters, measured from the year in which the broadcast occurred.[350] Article 70, dealing with "Protection of Existing Subject Matter," requires members to give qualified retroactive protection not only to literary and artistic works under the terms of Article 18 of the Berne Paris Act,[351] but also to the rights of performers and phonogram producers in phonograms.

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344. *See* §6.1., below.
345. TRIPs Agreement Art. 10(1). *See* §6.1.2.9, below.
346. TRIPs Agreement Art. 10(2). *See* §6.1.2.7, below.
347. *See* §6.2.4, below.
348. *See* §6.1.3.1, below. The origins of the clause can be traced to a Japanese proposal that would have excluded programming languages, rules, or algorithms from the scope of protection for computer programs; this proposal evolved into an exclusion for ideas, procedures, methods, or systems underlying computer programs or databases, which was then expanded and applied to all forms of literary and artistic works. *See* Gervais 1998, 78.
349. TRIPs Agreement Art. 12. *See* §8.1, below.
350. TRIPs Agreement Art. 14(5). *See* §8.2, below.
351. *See* §8.4, below. Article 70(2) provides that copyright "obligations with respect to the rights of producers of phonograms and performers in existing phonograms shall be determined solely under Article 18 of the Berne Convention (1971) as made applicable under paragraph 6 of Article 14 of this Agreement." TRIPs Agreement Article 14(6) provides that Berne Article 18 shall apply "*mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms."

§3.4.1.5 Rights and Remedies

In addition to the minimum economic rights prescribed in the Berne Paris Act,[352] the TRIPs Agreement obligates members to give authors and phonogram producers a qualified exclusive right to authorize or prohibit the commercial public rental of their computer programs, cinematographic works, and phonograms.[353] In the case of computer programs, the obligation to grant a rental right does not apply to rentals when "the program itself is not the essential object of the rental."[354] In the case of cinematographic works, the obligation will not apply unless rentals have led to widespread copying, materially impairing the reproduction right in these works.[355] A member that as of April 15, 1994, had in force a system of equitable remuneration for phonogram rentals may maintain that system so long as commercial rentals are not "giving rise to the material impairment of the exclusive rights of reproduction of right holders."[356]

Article 14 of the TRIPs Agreement requires members to grant specific rights to performers, phonogram producers, and broadcasting organizations. Members must give performers the right to communicate their performances to the public or broadcast them by wireless means, to fix their unfixed performances, and to reproduce fixations.[357] Phonogram producers must receive the "right to authorize or prohibit the direct or indirect reproduction of their phonograms."[358] Broadcasting organizations must receive the right to fix and reproduce fixations of broadcasts as well as to rebroadcast them by wireless means and to communicate television broadcasts to the public; "[w]here Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971)."[359]

Article 13 of the TRIPs Agreement borrows the three-step formula of Article 9(2) of the Berne Convention, Paris Act,[360] in its provision that "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work

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352. *See* §9.1, below.
353. TRIPs Agreement Art. 11 (computer programs and cinematographic works); Art. 14(4) (phonograms). *See* §9.1.2.2, below.
354. TRIPs Agreement Art. 11. *See* §9.1.2.2, below.
355. TRIPs Agreement Art. 11. *See* §9.1.2.2, below.
356. TRIPs Agreement Art. 14(4). *See* §9.1.2.2, below.
357. TRIPs Agreement Art. 14(1). *See* §9.2.1, below.
358. TRIPs Agreement Art. 14(2). *See* §9.2.2, below.
359. TRIPs Agreement Art. 14(3).
360. *See* §11.1, below.

and do not unreasonably prejudice the legitimate interests of the right holder."[361] In the case of the related rights of performers, phonogram producers, and broadcasting organizations, Article 14(6) allows members to "provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention."[362] The Agreement effectively leaves the question of exhaustion of intellectual property rights untouched.[363]

Part III of the TRIPs Agreement, encompassing Articles 41 through 61, prescribes minimum standards for enforcement of intellectual property rights. These provisions strike a balance between copyright-exporting countries that desired an ample, even draconian array of copyright remedies and countries concerned that a minimum remedial standard would improperly interfere with the traditional exercise of discretion by national courts. Article 41(1) requires as a general minimum standard that members "ensure that enforcement procedures as specified in this Part are available under their national laws so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements."

In addressing specific remedies, Part III strikes the balance between judicial autonomy and substantive specificity by requiring only that members give their judicial authorities the power to award each remedy. So, for example, Article 44(1) requires that "judicial authorities shall have the authority to order a party to desist from an infringement." Similar provision is made for the requisite authority to award damages, expenses, and attorney's fees;[364] to order disposition of infringing goods;[365] to order preliminary relief, even on an *ex parte* basis where appropriate.[366] Articles 51 through 60 make more direct provision for enforcement through border measures.[367]

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361. Note however that Article 13 TRIPs refers to the interests of the "right holder," not "the author" as does Article 9(2) of the Berne Convention.
362. *See* Chapter 11, below. Article 14(6) adds: "However, the provision of Article 18 of the Berne Convention (1971) shall also apply, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms."
363. Article 6 of the TRIPs Agreement provides: "For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 above nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights."
364. TRIPs Agreement Art. 45. *See* §12.2, below.
365. TRIPs Agreement Art. 46. *See* §12.1, below.
366. TRIPs Agreement Art. 50. *See* §12.1.1, below.
367. *See* §12.4, below.

§3.4.2 Regional and Bilateral Trade Agreements

While the TRIPs Agreement has not been revised since its adoption in 1994, the United States and the European Union have actively, and successfully, pursued bilateral and regional trade agreements with their main trading partners that typically impose intellectual property obligations that exceed TRIPs standards. These obligations are framed either as general commitments to comply with international conventions such as the WIPO Internet Treaties, or as more detailed substantive "TRIPS-plus" norms.[368]

Although these bilateral or regional arrangements have not been formed on the common platforms for multilateral norm setting, such as WIPO and the WTO, they derive much of their normative impact from their linkage with the existing international agreements. The national treatment rule embodied in these multilateral instruments, as well as the TRIPs most-favored-nation requirement, obligate WTO members such as the United States, the Member States of the European Union, and most of their bilateral trading partners to extend any TRIPs-plus privileges granted by bilateral or regional arrangements to nationals or residents of any other WTO member country not party to these agreements. Thus, bilateral or regional norms have become global norms almost automatically, and the political expediency of this form of—sometimes controversial[369]—bilateral or regional norm setting is easily understood.

Bilateral or regional trade agreements initiated by the United States are usually called "Free Trade Agreements" and commonly contain a separate chapter on intellectual property setting out relatively precise minimum standards. By contrast, similar arrangements initiated by the European Union commonly refer to existing international conventions and rarely contain explicit substantive norms.

§3.4.2.1 Free Trade Agreements

The United States has pursued a vigorous agenda of bilateral and regional trade negotiations, which has resulted in the conclusion of no fewer than 17 Free Trade Agreements (FTAs) by 2010. The first and most prominent of these agreements is the North American Free Trade Agreement (NAFTA), which was entered into among Canada, Mexico, and the United States and approved by the three governments on October 7, 1992. Other notable FTAs include the Australia-United States Free Trade Agreement of 2004 (AUSFTA)

368. *See* Ruth Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Agreements*, 1 Ottawa Journal of Law and Technology (2004).

369. *See, e.g.*, Burrell & Weatherall 2008..

and the Central American Free Trade Agreement that was concluded in the same year (CAFTA).

NAFTA

NAFTA contains among other objects provisions on copyright, sound recordings, and encrypted program-carrying satellite signals.[370] The NAFTA negotiations began well after the start of the TRIPs discussions but were completed one year before the TRIPs Agreement concluded,[371] and NAFTA's copyright provisions borrowed concepts and language from drafts of the TRIPs Agreement.

a) Conditions of Protection

The point of attachment for NAFTA's intellectual property provisions is nationality.[372] NAFTA promises nationals of member states that the other members states will grant them national treatment[373] bolstered by three sets of minimum standards: "adequate and effective protection and enforcement of intellectual property rights;"[374] the terms of the 1971 Paris Act of the Berne Convention;[375] and specific subject matter standards and standards for rights in literary and artistic works and sound recordings.

NAFTA qualifies the national treatment guarantee for sound recordings. Though requiring each party to give national treatment to producers and performers who are nationals of another party, Article 1703(1) provides that "a Party may limit rights of performers of another Party in respect of secondary uses of sound recordings to those rights its nationals are accorded in the territory of such other Party." "Secondary uses of sound recordings" typically means broadcasts, and the effect of this provision is that Mexico and Canada, which are parties to the Rome Convention, which entitles performers to rights in the broadcast of their recordings, are not obligated to provide for

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370. Other intellectual property provisions of NAFTA deal with trademarks (Art. 1708), patents (Art. 1709), layout designs of semiconductor integrated circuits (Art. 1710), trade secrets (Art. 1711), geographical indications (Art. 1712), and industrial designs (Art. 1713).

    For a detailed discussion of the intellectual property provisions of NAFTA, see Richard E. Neff & Fran Smallson, NAFTA: Protecting and Enforcing Intellectual Property Rights in North America (1994).

371. On the history of the TRIPs Agreement see §3.4.1.1, above.
372. NAFTA Art. 1701(1).
373. NAFTA Art. 1703.
374. NAFTA Art. 1701(1).
375. NAFTA Art. 1701(2)(b). Article 1701(2) also requires each party to "at a minimum" give effect to the "substantive provisions" of the Geneva Phonograms Convention (1971); the Paris Convention for the Protection of Industrial Property (1967); and the 1978 or 1991 Acts of the International Convention for the Protection of New Varieties of Plants.

compensation to American performers whose performances are publicly transmitted in Mexico or Canada, since the United States, not a party to the Rome Convention, does not grant a right to compensation under its domestic law.[376] Since, however, Article 1703(1) guarantees national treatment for "producers and performers" and allows this exception only with respect to "performers," American producers of sound recordings will presumably be entitled to compensation for secondary uses in Mexico and Canada.

Article 1703(2) provides that "[n]o Party may, as a condition of according national treatment under this Article, require right holders to comply with any formalities or conditions in order to acquire rights in respect of copyright and related rights." Since Canada, Mexico, and the United States are all parties to a text of the Berne Convention that prohibits formalities as a condition to the enjoyment and exercise of the rights secured by that Convention,[377] the significance of Article 1703(2) lies in the phrase, "and related rights." The provision is presumably aimed at forestalling development in the NAFTA countries of the practice of some European Union countries of subjecting protection of related rights to a condition of reciprocity or, alternatively, to a formality such as first publication or fixation in the protecting country.[378]

b) Subject Matter

Article 1705(1) of NAFTA, obligating each Party to "protect the works covered by Article 2 of the Berne Convention, including any other works that embody original expression within the meaning of that Convention," closely parallels the TRIPs Agreement in securing protection for computer programs and data compilations, "which by reason of the selection or arrangement of their contents constitute intellectual creations."[379] However, NAFTA's formulation for computer programs is arguably more rigorous than the formulation in TRIPs, since it provides that "all types of computer programs are literary works within the meaning of the Berne Convention,"[380] where the TRIPs Agreement provides that "[c]omputer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)."[381] Although the phrase "all types of computer programs" may in some respects be narrower than "whether in source or object code," the statement in NAFTA that computer programs *are* literary works within the meaning of the Berne Convention is arguably more sweeping than the statement that they are to be protected *as* literary works. Nonetheless, a significant

376. *See* §9.2.1, below.
377. *See* §6.1.4.1, below.
378. *See* §6.2.5, below.
379. TRIPs Agreement Art. 10(2). *See* §6.1, below.
380. NAFTA Article 1705(1)(a).
381. TRIPs Agreement Art. 10(1).

question exists whether three countries can, outside the text of a Berne Act, conclusively declare what is or what is not a literary work under Berne.

Annex 1705.7 to NAFTA obligates the United States to "provide protection to motion pictures produced in another Party's territory that have been declared to be in the public domain pursuant to 17 U.S.C. section 405."[382] Section 405 of the 1976 Copyright Act had, until March 1, 1989—the date of the coming into force of the Berne Convention Implementation Act—forfeited U.S. copyright in works published without the copyright notice required by the Act, and the failure to restore copyright to such works upon adherence to the Berne Convention in 1989 had arguably put the United States in violation of Article 18 of the 1971 Paris Act. The North American Free Trade Agreement Implementation Act[383] partially corrected this omission by adding to the 1976 Act a new section 104A providing for restoration of copyright in Canadian and Mexican films.[384] Following U.S. adherence to the TRIPs Agreement, with its more sweeping requirement of retroactive protection,[385] the Uruguay Round Implementation Amendments substantially broadened section 104A.[386]

c) Ownership and Term

NAFTA Article 1705(3) advances the principle of freedom of contract for copyright and related rights by effectively outlawing rules, as are commonly found in civil law countries, constraining an author's freedom to alienate copyright. Under this provision, "any person acquiring or holding economic rights may freely and separately transfer such rights by contract for purposes of their exploitation and enjoyment by the transferee,"[387] and "any person acquiring or holding such economic rights by virtue of a contract, including contracts of employment underlying the creation of works and sound recordings, shall be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights."[388] Although Article 1705(3) is presumably aimed at civil law inalienability rules, its terms will at least cast a cloud over such common law inalienability rules as the nonwaivability provision of the U.S. Copyright Act's termination of transfer provisions.[389]

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382. Annex 1705.7 adds, "This obligation shall apply to the extent that it is consistent with the Constitution of the United States, and is subject to budgetary consideration."
383. Pub. L. No. 103-182, 107 Stat. 2057, 2115 (1993).
384. *See* §5.6.1.3, below.
385. *See* §8.4, below.
386. *See* §5.6.1.3, below.
387. NAFTA Art. 1705(3)(a).
388. NAFTA Art. 1705(3)(b).
389. *See* §7.6.1.2, below.

Article 1705(4) provides that "[e]ach Party shall provide that, where the term of protection of a work, other than a photographic work or a work of applied art, is to be calculated on a basis other than the life of a natural person, the term shall be not less than 50 years from the end of the calendar year of the first authorized publication of the work or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making."

d) Rights and Remedies

NAFTA effectively imports the full array of Berne rights in its requirement that parties to the Agreement apply the substantive provisions of the Berne Paris Act.[390] However, an annex to the Agreement expressly exempts the United States from the moral rights obligation imposed by Article 6*bis* of the Berne Paris Act.[391] In addition to the Berne minimum rights, NAFTA requires parties to give literary and artistic works and sound recordings rights over importation of unauthorized copies[392] and first public distribution of the original and copies of a work.[393] Articles 1705(2)(d) and 1706(1)(d) prescribe a commercial rental right for computer programs and sound recordings respectively. Article 1705(2)(c) requires a right to communicate the work to the public in the case of literary and artistic works, and Article 1706(1)(a) requires a right of "direct or indirect reproduction" in the case of sound recordings.

NAFTA draws on the three-step formulation employed in Article 9(2) of the Berne Paris Act to define permitted limitations on rights in literary and artistic works and sound recordings: "Each Party shall confine limitations or exceptions to the rights provided for in this Article to certain special cases that do not conflict with a normal exploitation of the work [or sound recording] and do not unreasonably prejudice the legitimate interests of the right holder."[394] In a measure presumably aimed at Mexico's special position as a developing country under the Berne Convention, Article 1705(6) of NAFTA provides that "[n]o Party may grant translation and reproduction licenses permitted under the Appendix to the Berne Convention where legitimate needs in that Party's territory for copies or translations of the work could be met by the right holder's voluntary actions but for obstacles created by the Party's measures."

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390. NAFTA Art. 1701(2)(b).
391. NAFTA Annex 1701.3(2).
392. NAFTA Arts. 1705(2)(a), 1706(1)(b).
393. NAFTA Arts. 1705(2)(b), 1706(1)(c).
394. NAFTA Arts. 1705(5), 1706(3).

NAFTA contains an unusually wide-ranging and detailed set of provisions on remedies, "including expeditious remedies to prevent infringements and remedies to deter further infringements."[395] Some remedies are left to the authority of the local judiciary, with the Agreement requiring that each party give its judicial branch the necessary authority to order injunctive relief,[396] including provisional relief, such as authority to bar importation of infringing copies;[397] to award damages "adequate to compensate for the injury the right holder has suffered";[398] to award costs and attorneys' fees;[399] to dispose of infringing goods;[400] and to order *ex parte* seizure of goods.[401] Article 1717 requires "criminal procedures and penalties" to be applied to "copyright piracy on a commercial scale," and Article 1718 requires the adoption of effective border control measures to interdict pirated goods.

AUSFTA

In rigor and detail, the copyright and neighboring rights provisions of the Australia-United States Free Trade Agreement, concluded between the two countries on February 8, 2004, typify those of the current generation of U.S. Free Trade Agreements.[402] Chapter 17 of the Agreement deals with intellectual property rights generally, and Articles 17.4–17.7 with copyright and neighboring rights. Article 17.1 affirms the parties' ratification or accession to several multilateral intellectual property treaties, including the Brussels Convention and the Berne Convention;[403] affirms their mutual rights and obligations under the TRIPs Agreement;[404] and obligates the parties to ratify or accede to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.[405] Article 17.1 also confirms the copyright treaty principles of national treatment [406] and retroactivity.[407]

A second set of obligations that can be characterized as "TRIPs-plus" or, more generally, "multilateral-plus," effectively export U.S. copyright norms into Australia. Among these are a minimum copyright term measured by the

395. NAFTA Art. 1714(1).
396. NAFTA Art. 1715(2)(c).
397. NAFTA Art. 1716(1)(a).
398. NAFTA Art. 1715(2)(d).
399. NAFTA Art. 1715(2)(d),(e).
400. NAFTA Art. 1715(5).
401. NAFTA Art. 1716(4).
402. For a discussion of the AUSFTA, including its political causes and consequences in Australia, see Burrell & Weatherall 2008.
403. AUSFTA Art. 17.1(2).
404. AUSFTA Art. 17.1(4).
405. AUSFTA Art. 17.1(4).
406. AUSFTA Art. 17.1(6)–(8).
407. AUSFTA Art. 17.1 (9)–(10).

life of the author plus seventy years[408] and provisions on anti-circumvention and digital rights management.[409] Article 17.4(6) affirms the principle of freedom of contract, providing that "[e]ach Party shall provide that for copyright, any person acquiring or holding any economic right in a work, performance or phonogram . . . may freely and separately transfer that right by contract." Ironically, the U.S. Copyright Act itself departs from this norm by making nontransferable and nonwaivable the author's right to terminate his copyright transfers after a statutorily prescribed period.[410]

CAFTA

CAFTA, the Central American Free Trade Agreement, was concluded in 2004 between the United States, five Central American countries, and the Dominican Republic and includes provisions on patents, trademarks, geographical indications, and Internet domain names,[411] as well as on copyright and related rights. Among other minimum standards, the countries party to the Agreement must secure authors, performers, and producers the right to authorize or prohibit reproductions of works and the making available of works,[412] including making works available "in such a way that members of the public may access these works from a place and at a time individually chosen by them."[413] Parties are also expected to introduce "adequate legal protection and effective legal remedies against the circumvention of effective technological measures"[414] and protection for rights management information.[415] A special provision deals with rights of performers and producers of phonograms.[416]

§3.4.2.2 Other Trade Agreements

Although Free Trade Agreements are usually associated with the United States, many other countries have in recent years entered into bilateral or regional trade arrangements. Like the U.S.-initiated agreements, these are often called Free Trade Agreements and similarly contain substantive intellectual property obligations. For example, Australia has concluded a number of Free Trade Agreements with countries in the Asian and Oceanic region,

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408. AUSFTA Art. 17.4(4)(a).
409. AUSFTA Art. 17.4 (7)–(8).
410. *See* §7.6.1, below.
411. The Dominican Republic—Central America—United States Free Trade Agreement, Chapter 15.
412. *Ibid.*, Article 15.5(1), (2) and (4).
413. *Ibid.*, Article 15.6.
414. *Ibid.*, Article 15.5(7).
415. *Ibid.*, Article 15.5(8).
416. *Ibid.*, Article 15.7.

including a 2009 Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area[417] signed by 12 countries. The AANZ Agreement contains an extensive chapter on intellectual property protection, including various TRIPs-plus obligations. Contracting states are, for instance, obliged to "provide to authors of works the exclusive right to authorise any communication to the public of their works by wire or wireless means." Also, parties to the FTA "shall endeavour to . . . provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by copyright owners in connection with the exercise of their copyright rights and that restrict acts, in respect of their works, which are not authorised by the copyright owners concerned or permitted by law."[418]

The Group of Three Agreement between Mexico, Columbia, and Venezuela, which came into effect in 1995, is another regional trade agreement embodying copyright as well as other intellectual property norms, in this case, approximating those of NAFTA.[419]

In Europe, the European Commission has negotiated several bilateral and regional trade arrangements on behalf of the European Community and its member states.[420] These trade agreements come in various forms and usually contain rudimentary clauses, such as those obligating the trading partners to "grant and ensure adequate and effective protection of intellectual, industrial and commercial property rights in accordance with the highest international standards, including effective means of enforcing such rights,"[421] or to accede to designated international treaties, such as the Berne and Rome Conventions and the WIPO Treaties.[422] When an E.U. trade agreement serves as a stepping-stone to accession to the European Union, the agreement will also obligate the trading partner to implement the "Community *acquis*," i.e., all harmonization directives including those in the field of copyright and

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417. Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, signed in Cha-am, Phetchaburi, Thailand on February 27, 2009.

418. AANZFTA Agreement, Art. 13.5. *See* Kim Weatherall, *Intellectual Property in a Possible China-Australia Free Trade Agreement*, *in* Negotiating a Preferential Trading Agreement 155–169 (Sisira Jayasuriya, Donald MacLaren and Gary Magee eds., United Kingdom 2009).

419. *See* Carolita Oliveros, *Overview of Latin American and Asian Trade Laws*, SK068, ALI-ABA 359, 372 (2005).

420. *See* E.C. Treaty, Art. 133.

421. Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Members States and the State of Israel, OJ L147/3 of /June 21, 2000, Art. 39(1).

422. For example, the 2008 Cariforum-EC Economic Partnership Agreement concluded between the European Community, its member states and 13 Caribbean countries obliges the contracting parties to comply with the WIPO Treaties and to "endeavour to accede" to the Rome Convention; Cariforum-EC Economic Partnership Agreement, October 15, 2008, OJ L 289/I/3 of October 30, 2008, Art. 143.

neighboring rights.[423] Similarly, the E.E.A. Agreement[424] concluded between the European Community, its member states and Iceland, Liechtenstein, and Norway, contains an obligation to implement the Community *acquis* in the field of copyright and neighboring rights.[425]

§3.5 Intergovernmental Organizations

Most of the international copyright conventions discussed in this treatise have their institutional home with an intergovernmental organization (IGO). The World Intellectual Property Organization (WIPO), which oversees several treaties, including the Berne and Rome Conventions and the two WIPO Treaties, is a specialized IGO with an explicit mandate in the field of intellectual property. The World Trade Organization (WTO), which is responsible for the TRIPs Agreement, occupies the broad terrain of international trade relations. Besides WIPO and the WTO, other IGOs with mandates in ancillary fields, such as UNESCO and the International Labor Organization (ILO), play marginal, and diminishing, roles in the development of international copyright norms.

The World Intellectual Property Organization is a specialized agency of the United Nations. Based in Geneva, WIPO was established in 1967 by the WIPO Convention. According to Article 4 of the Convention, WIPO is charged with (i) promoting measures designed to facilitate the efficient protection of intellectual property throughout the world and to harmonize national legislation in this field; (ii) performing the administrative tasks of the unions established by the Paris and Berne Conventions; (iii) encouraging the conclusion of international agreements designed to promote the protection of intellectual property; (iv) cooperating with states requesting legal–technical assistance; and (v) disseminating information concerning the protection of intellectual property.[426] The membership of WIPO exceeds even the large number of states that have ratified the Berne Convention.[427]

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423. See for example Decision No 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union (96/142/EC), Annex 8.
424. Agreement on the European Economic Area, OJ No. L 1, January 3, 1994, p. 3.
425. E.E.A. Agreement, Annex 17 No. 9(e). *See generally* Silke von Lewinski, *Copyright Within the External Relations of the European Union and the EFTA Countries*, 16 E.I.P.R. 429 (1994).
426. Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967, as amended on September 28, 1979 (WIPO Convention), 848 U.N.T.S. 3 (July 14, 1967), Art. 4.
427. By January 1, 2010, WIPO had 184 member states.

WIPO has its roots in the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). Both conventions established "Unions," each supported by an International Bureau to carry out administrative tasks. In 1893 these bureaus merged to become the United International Bureaux for the Protection of Intellectual Property (BIRPI), which became WIPO in 1967. Besides the Berne Convention, WIPO administers 24 intellectual property treaties, of which 6 are in the field of copyright and neighboring rights: the Berne Convention for the Protection of Literary and Artistic Works (1886), the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, 1961), the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva, 1971), the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels, 1974), the WIPO Copyright Treaty (Geneva, 1996), and the WIPO Performances and Phonograms Treaty (Geneva, 1996). Administration of these conventions entails not only record-keeping (such as registering accessions, ratifications, and reservations by contracting states), but also preparing and hosting the regular meetings of so-called standing committees, where member states can discuss possible new instruments, and international diplomatic conferences that in some cases produce new treaties.

The World Trade Organization administers only a single instrument in the field of intellectual property—the TRIPs Agreement, which is part of a broad package of WTO trade agreements. Nevertheless, because TRIPs norms, which include virtually all of the Berne Convention's minimum standards, are enforceable between WTO members through the mechanism of dispute settlement, operationally the Agreement is arguably the most important instrument in the realm of international copyright. The WTO was established on January 1, 1995, at the conclusion of the Uruguay Round of international trade negotiations, begun in 1986. The WTO incorporates the General Agreement on Tariffs and Trade (GATT) system that was the main source of international trade norms and procedures from its inception in 1948. Where GATT had mainly dealt with trade in goods, the WTO and its agreements now encompass trade in services and intellectual property.[428] Like WIPO, the World Trade Organization is located in Geneva, Switzerland. WTO membership currently exceeds 150 countries. Within the WTO, the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPs Council) is the body responsible for administering the TRIPs Agreement, in particular monitoring the operation of the Agreement.[429]

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428. *See* § 3.4.1, above.
429. TRIPs Agreement Art. 68.

To this end the TRIPs Council regularly reviews WTO members' intellectual property laws.

Several other intergovernmental organizations are marginally involved in norm setting in the field of copyright and neighboring rights. UNESCO[430] remains the institutional home of the Universal Copyright Convention, which attained prominence in the 1960s and 1970s, by attracting membership of both the United States and the Soviet Union, the two superpowers that had remained outside the Berne Union. With the dwindling importance of the U.C.C. following American accession to the Berne Convention in 1989 and the demise of the Soviet Union, the role of UNESCO in the area of international copyright has diminished. However, UNESCO remains active in the field of neighboring rights by sharing responsibility with WIPO and ILO for the administration of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations and the Geneva Phonograms Convention.

430. The United Nations Educational, Scientific and Cultural Organization (UNESCO), founded in 1945, is a specialised agency of the United Nations. *See* Constitution of the United Nations Educational, Scientific and Cultural Organization, adopted in London on November 16, 1945, as amended.

CHAPTER
4

Territoriality, National Treatment, Jurisdiction, and Conflict of Laws

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The international exploitation of copyrighted works often implicates questions of territoriality, national treatment, and choice of law. Copyright is territorial; a French or Japanese copyright does not exist outside France or Japan.[1] The treaty obligation of national treatment requires member countries to give works originating in other member countries no less favorable treatment than they give to works of their own nationals; under the Berne Convention, for example, a Japanese work will as a rule receive in France the same protection that a work by a French national would receive in France.[2] The general choice of law rule for determining whether a copyright has been infringed is to apply the law of the country in which the unauthorized use occurred; if a lawsuit is filed in the United States for the unauthorized use in France of a work originating in Japan, the U.S. court will apply French law to determine whether the use infringes.[3]

Territoriality, national treatment, and choice of law overlap. If, as a rule, a country's copyright law has no effect outside its territory, its copyright law will also be the only one that has effect inside its territory—at least so long as other countries follow the same rule. Since the relevant choice of law rule for copyright infringement calls for application of the law in force in the place where the infringement occurred, territoriality implies that the law governing an infringement will in most, if not all, cases be the law of the country where the infringement occurred. Similarly, national treatment under the copyright treaties, although not strictly speaking a choice of law rule, often operates as a choice of law rule in practice, subjecting foreigners and nationals alike to the law of the protecting country.

No need would exist for rules on territoriality, national treatment, and choice of law if copyright laws were the same from country to country. Contemporary trends toward harmonization, most notably in the copyright and neighboring rights provisions of the TRIPs Agreement, should not, however, be mistaken for a trend toward a universal copyright. Harmonization under the TRIPs Agreement, as under the Berne Convention and the WIPO Copyright and Performances and Phonograms Treaties, requires member countries only to comply with minimum standards of protection for eligible foreign right holders. Because member countries may, and regularly do, surpass the treaty minima in their domestic legislation, and because the treaty minima do not encompass such important issues as copyright authorship and ownership, it seems likely that rules on territoriality, national treatment, and conflicts will remain important over the foreseeable future. Even the seven European harmonization directives that provide for full harmonization of distinct rules in the field of copyright and neighboring rights have failed to

1. *See generally* §4.1, below.
2. *See generally* §4.2, below.
3. *See generally* §3.3, below.

created a regime of universal protection across the European Union, since copyrights and neighboring rights in the member states remain strictly territorial.[4]

Some commentators have suggested that increased global transmission of copyrighted works will severely burden existing procedural mechanisms rooted in territoriality and choice of law.[5] In fact, the problem of enforcement against widely dispersed unauthorized uses of copyrighted works is not unique to the electronic age; the global transmission of copyrighted works without authority presents essentially the same issues as unauthorized photocopying and home taping, both of which have been on national copyright agendas for decades. Nor is determining accountability for multinational infringement uniquely burdensome. Courts have long been equipped to inquire into the copyright laws of other countries, and the number of countries digitally traversed by a single copyright defendant is not likely to be unmanageably large.

Suggestions that global digital transmissions require reform in rules on territoriality and choice of law also overlook the significant and growing role that contracts play in this environment. A large-scale licensee of a copyrighted work will usually negotiate a global license. Small-scale users may bind themselves by electronically negotiated contracts executed on the information network itself. In either case, a governing law clause in the license agreement should ensure that the agreement is enforced uniformly, regardless of the place of breach or the forum for litigation. In short, fundamental rules on territoriality, national treatment, and choice of law seem likely not only to endure, but to endure largely unchanged in the new digital environment.

The strains that global electronic communications place on copyright commerce seem more likely to produce change in the substantive norms governing new technological uses of copyrighted works than in the procedural norms of territoriality and conflict of laws. Change will most likely take the form of rules centralizing liability for uses of copyrighted works that cross several national boundaries. One example is the European Community's 1993 Satellite Directive, which defines the operative act of "communication to the public by satellite" as occurring solely "in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth."[6]

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4. *See* VAN EECHOUD ET AL. 2009, Chapter 9.
5. *See, e.g.*, GELLER 1996; Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 J. COPR. SOC'Y 318, 319 (1995); REINDL 1998, 800.
6. E.C. Satellite and Cable Directive Art. 1(2)(a). According to Recital 14 to the Directive, this "definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting." *See* §§ 4.4.1.2, 9.1.4.3 below.

Another example is U.S. legislation regulating the imposition of secondary copyright liability on Internet service providers.[7]

§4.1 The Territoriality Principle

The territoriality principle generally holds that a state has no competence to prescribe legal rules to govern activities that occur outside its national borders.[8] The principle, which is not always so rigorously formulated in contemporary practice, responds to two interests. One is an interest in national sovereignty. For State *A* to impose copyright liability on conduct occurring in State *B* might be viewed by State *B* as an attack on its sovereignty, particularly if its own law excused the same conduct from copyright liability. Second, the territoriality principle seeks to promote international commerce by securing reasonable investment expectations. If Country *A* imposes copyright liability on the unauthorized copying of television news broadcasts but Country *B* does not, it could well undermine the reasonable business expectations of a copy service doing business entirely in Country *B* for Country *A* to subject its activities to liability under Country *A*'s copyright law.

Copyright law's strict adherence to the principle of territoriality has deep historical roots. The printing privileges or "patents" that preceded modern-day copyright were essentially instruments of public law, with little or no normative claim outside the sovereign territory of the prince, parliament, or other public authority that granted the privileges.[9] Since the middle of the twentieth century, courts have relaxed the territoriality principle in some fields of law. Copyright law has been largely untouched by these departures.[10] One reason for copyright's relative immunity from these liberalizing trends is that countries that might otherwise be inclined to foster the extraterritorial application of protectionist copyright rules have succeeded in getting their copyright norms adopted in international agreements such as the TRIPS Agreement and the WIPO Copyright Treaty.[11] Once local copyright norms become globally enforceable norms, little pressure remains to export local

7. On-line Copyright Infringement Liability Limitation Act, Pub. L. 105-304 (October 28, 1998). *See generally* §9.1.5, below.
8. *See generally* Joseph Story, Commentaries on the Conflict of Laws §8 (6th ed. 1865). *See also* Hessel Yntema, *The Historic Bases of Private International Law*, 2 Am. J. Comp. Law, 297, 305–308 (1953).
9. *See* §2.1, above.
10. In the United States, the departure closest to copyright is in trademark law, where courts have dramatically extended the law's reach outside the country's borders. *See, e.g.*, Steele v. Bulova Watch Co., 344 U.S. 280, 286–87 (1952). *See generally* Bradley 1997, 526–36.
11. *See* §§ 3.4.1, 3.1.4, above.

rules through extraterritorial application. However, the fact that copyright law is territorial does not mean that confining it to local conduct will in all cases be correct, nor does it mean that applying it outside a nation's borders will in all cases be wrong. Hard questions arise in three areas: where acts of infringement occur in more than one country;[12] where one element of the copyright infringement occurs in one country and another element in a second country;[13] and where acts in one country bear not on infringement in the second country, but rather on the very existence of copyright there.[14]

§4.1.1 Territoriality in International Law

Three maxims formulated by the seventeenth-century Dutch scholar Ulrik Huber undergird the modern concept of territoriality: (1) a state's laws have force only within the state's boundaries; (2) anyone found within the state's boundaries is subject to the state's authority; and (3) comity will discipline sovereign exercises of authority so that the territorial effect of each state's laws is respected.[15] As synthesized by Harold Maier, these axioms "state that acts of foreign sovereigns should, when appropriate, be given effect within another state's territory and that courts of all nations should indulge a presumption against the extraterritorial impact of law."[16]

Strict territoriality is by far the main rationale, and limitation, for state authority. Nonetheless, conduct that occurs outside a country, and that has or is intended to have a substantial effect inside the country, may be subject to a state's prescriptive jurisdiction. One instance is the application of antitrust rules against foreign conduct that has domestic effects. The obvious danger of such an exception is its potential indeterminacy. For example, where Country *B* excuses the unauthorized use of certain classes of works, Country *A*, a leading exporter of this class of works, might seek to apply its copyright law to such acts occurring in Country *B* on the ground that Country *B*'s general excuse of these acts injures Country *A*'s balance of copyright trade.[17]

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12. *See* §4.3.3.1, below.
13. *See* §4.3.3.2, below.
14. *See* §4.1.2, below.
15. *See* D.J. Llewelyn Davies, *The Influence of Huber's de Conflictu Legum on English Private International Law*, 18 Brit. Y. B. Int'l. L. 49, 56–63 (1937). *See generally*, Ernest G. Lorenzen, Huber's de Conflictu Legum, 13 Ill. L. Rev. 375 (1918); Maier 1982, 284–85; Hessel E. Yntema, *The Comity Doctrine*, 65 Mich. L. Rev. 9 (1966).
16. Maier 1982, 282.
17. *See, e.g.*, Ian Brownlie, Principles of Public International Law 307–09 (3rd ed. 1980); R.Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 Brit. Y.B. Int'l L. 146, 154–55 (1957).

Nations do not always honor international law rules. It is, for example, "well-settled" in U.S. law that "if Congress enacts legislation in violation of public international law, U.S. courts are bound to disregard international law and apply the domestic statute."[18] Well into the twentieth century, courts in the United States avoided conflict between domestic legislation and international law by presuming that Congress intended to confine a statute's "operation and effect to the territorial limits over which the lawmaker has general and legitimate power."[19] Although American courts subsequently departed from this canon of construction to apply federal antitrust and trademark law extraterritorially,[20] they continue to apply the presumption against extraterritoriality in other areas, including copyright.[21]

§4.1.2 Territoriality in Copyright Law

Territoriality, the principle that a country's prescriptive competence ends at its borders, dominates international copyright cases.[22] In its *Lagardère* ruling, the European Court of Justice expressly confirmed the territorial nature of copyright and related rights, even within the European Union. According to the Court, "At the outset, it must be emphasised that it is clear from its wording and scheme that [the Rental Right Directive] provides for minimal harmonisation regarding rights related to copyright. Thus, it does not purport to detract, in particular, from the principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty.

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18. Gary B. Born & David Westin, International Civil Litigation in United States Courts 574 (2d ed. 1992). Constitutional due process limitations may, however, limit a statute's extraterritorial reach. *See generally* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217 (1992).
19. American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909). *See generally*, Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179.
20. *See generally* Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 Sup. Ct. Rev. 289.
21. *See, e.g.*, Bradley 1997.
22. *See* Ulmer 1978, 13–14. *See also* György Boytha, *Some Private International Law Aspects of the Protection of Authors' Rights*, 24 Copyright 399 (1988).

    Some courts will give extraterritorial effect to a country's trademark and unfair competition laws. *See, e.g.*, Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952). Since trademark and trade dress protection sometimes overlap copyright protection, most notably in the case of industrial design, this distinction can be strategically exploited to gain extraterritorial protection for subject matter that copyright would leave unprotected. *See, e.g.*, Fun-damental Too, Ltd. v. Gemmy Industries Corp., 111 F.3d 993, 1006 (2d Cir. 1997).

Those rights are therefore of a territorial nature and, moreover, domestic law can only penalise conduct engaged in within national territory."[23]

The principle of territoriality is abundantly evident in cases where all acts of exploitation affecting the copyrighted work occur abroad. A U.S. federal court that had personal jurisdiction over the parties in a case where all acts of alleged infringement occurred in six Latin American countries ruled that it would apply the law of those six countries, not U.S. law, to resolve the dispute.[24] Similarly, the German Federal Supreme Court has held that the German Copyright Act's *droit de suite* provision[25] does not apply to the resale in Great Britain of the work of a German artist;[26] "it follows from the principle of territoriality in the present case that the resale that gives rise to the *droit de suite* must have taken place at least partly in Germany."[27]

In another case, involving transmissions from a radio and television station located on the German side of the French border, but aiming at French audiences, the German Court ruled that such terrestrial broadcasts implicate the exclusive right of broadcasting protected under German law even if they reach only a very small part of the German population.[28]

The territoriality principle treats the rights embodied in copyright as bounded by a nation's borders and consequently operates only to circumscribe attempts by one country to have its law define conduct occurring in another country. An obvious example would be where Country *A* characterizes a party's unauthorized reproduction of a copyrighted work in Country *B* as infringement under the law of Country *A*. By contrast, it will not offend the territoriality principle for one country to attach legal consequence to acts occurring in a second country where the legal consequence bears exclusively on the question whether a right has been infringed inside the first country's borders. For example, it does not implicate the territoriality principle for Country *A* to adopt and enforce a rule that the first sale of copies of a copyrighted work in Country *B* will exhaust the work's exclusive distribution right within the territory of Country *A*.[29] Country *B* is of course free to determine whether a first sale inside its borders—or outside them for that matter—exhausts the distribution right within its own territory.

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23. Lagardère Active Broadcast v. Société pour la Perception de la rémunération équitable (SPRE) and Others, European Court of Justice July 14, 2005, case C-192/04, para. 46.
24. *See* London Film Prods. Ltd. v. Intercontinental Communications Inc., 580 F. Supp. 47, 48–49 (S.D.N.Y. 1984). *See generally* §4.3.1.1, below.
25. Germany, Copyright Act Art. 26(1). *See generally* §9.1.2.4, below.
26. *Folgerecht bei Auslandbezug* ("Droit de suite with Respect to Sales Abroad"), German Fed. Sup. Ct., June 16, 1994, Case No. I ZR 24/92, a 26 I.I.C. 573 (1995).
27. *Id.* at 575.
28. *Felsberg Transmitter*, German Federal Supreme Court, November 7, 2002, Case I ZR 175/00, 35 I.I.C. 977 (2004).
29. *See, e.g.*, Quality King Distribution Inc. v. L'Anza Research Int'l, 118 S.Ct. 1125, 1134 (1998).

Courts, most notably in the United States, sometimes overlook that, simply because acts abroad may have consequence under domestic law, this fact alone does not necessarily implicate the territoriality principle. Under the 1909 U.S. Copyright Act, courts relied on notions of territoriality to hold that the Act's requirement that a copyright notice be affixed to all publicly distributed copies as a condition to protection did not extend to works published abroad. One case held that the first publication of the children's classic *Bambi*, in Germany in 1923, without copyright notice did not forfeit the U.S. copyright; noting that the publication did not divest copyright under the German law, the court concluded that the territorial nature of copyright, and the fact that U.S. copyright law has no extraterritorial effect, required the result.[30]

§4.2 National Treatment

As embodied in the main copyright and neighboring rights conventions, national treatment is a rule of nondiscrimination, promising foreign creators who come within the treaty's protection that they will enjoy in the protecting country no less favorable treatment for their creations as the protecting country gives to its own nationals. Stephen Ladas's characterization of national treatment under the Berne Convention applies to the other conventions as well: "the complete assimilation of foreigners to nationals, without condition of reciprocity."[31] It is a measure of the principle's pervasiveness in international copyright that the 1971 Paris Act of the Berne Convention carves out only three exceptions from its general requirement of national treatment: for copyright term,[32] protection of applied art and industrial design,[33] and the resale royalty right, or *droit de suite*.[34]

The terms in which the copyright and neighboring rights treaties formulate their national treatment rule may vary. While Article 5(1) of the Berne Convention provides that authors shall enjoy in protecting countries "the rights which their respective laws do now or may hereafter grant to their

30. Twin Books Corp. v. Walt Disney Co., 83 F.3d 1162, 1165–67 (9th Cir. 1996). *See also* United Dictionary Co. v. G. & C. Merriam Co., 208 U.S. 260, 264 (1908) ("[I]t is unlikely that it [Congress] would make requirements of personal action beyond the sphere of its control. Especially is it unlikely that it would require a warning to the public against the infraction of a law beyond the jurisdiction where that law was in force.")
31. Ladas 1938, 365.
32. Berne Convention, 1971 Paris Text, Art. 7(8). *See* §8.3.1, below.
33. Berne Convention, 1971 Paris Text, Art. 2(7). *See* §6.1.2.10, below.
34. Berne Convention, 1971 Paris Text, Art. 14*ter*(2). *See* §9.1.2.4, below.

nationals, as well as the rights specially granted by this Convention,"[35] the Rome Convention simply obligates contracting states to "grant national treatment," subject "to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention."[36] The WIPO Performances and Phonograms Treaty similarly withholds full application of the national treatment principle by requiring contracting parties merely to "accord to nationals of other Contracting Parties . . . the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty."[37] In other words, Rome and WPPT countries are obliged to offer national treatment only for rights expressly guaranteed in these conventions. The TRIPs Agreement, which encompasses not only copyright and neighboring rights, but also industrial property, provides that "[e]ach Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits."[38]

New classes of creative work, and new means for exploiting them, inevitably present the question whether they come within the "works" and "rights" contemplated by the national treatment obligation of Berne Article 5(1) or the "protection of intellectual property" contemplated by the TRIPs Agreement. Commentators generally agree that convention law, not national law, governs the question whether a class of subject matter or a means of exploitation falls within the convention's scope so that it is subject to the national treatment requirement.[39] As Professor Ulmer observed, "[t]he nature and content of the legal provisions may certainly be important. But the terminology used and the classification given by the national law remains irrelevant."[40] Convention rules governing existing works[41] and

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35. Berne Convention, 1971 Paris Text, Art. 5(1). *Compare* Universal Copyright Convention, 1971 Paris Act Art. II.
36. Rome Convention Art. 2(2). *See also* Arts. 4, 5(1), 6(1).
    The Geneva Phonograms Convention does not have a national treatment requirement. *See* WIPO 1981, 102.
37. WIPO Performances and Phonograms Treaty Art. 4(1).
38. TRIPs Agreement Art. 3(1) (footnote omitted). Note 3 to Article 3(1) provides, "For the purpose of Articles 3 and 4, protection shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement."
39. *See, e.g.*, Steup 1978, 281–282 ("The freedom of member states of an international treaty to grant or not grant rights does not necessarily include the freedom to decide whether a granted right belongs to the subject matter of the treaty or not."); Burger 1988, 491–495.
40. Eugen Ulmer, *The "Droit de Suite" in International Copyright Law*, 6 I.I.C. 12, 22 (1975).
41. *See* §4.2.2, below.

media,[42] as well as the underlying trade economics of national treatment,[43] can help to shed light on the question whether new classes of creative work and new means of exploitation will in any case be entitled to national treatment.

A separate but related question for national treatment arises when a creative product admittedly falls outside a convention's minimum terms, but a country elects to protect it under its copyright legislation, nonetheless. One example is the U.S. Copyright Act's inclusion of sound recordings—concededly not Berne subject matter[44]—among the objects of its protection.[45] Must the country in this case extend protection to other convention nationals, even though it could have legitimately avoided this result by including the subject matter in a discrete statute, separate from copyright?[46] A persuasive argument can be made that the protecting country, having decided to treat the subject matter as belonging to copyright for its own nationals, should be required to give the same treatment to works originating on the territory of its treaty partners, at least if, as in the United States, the legislation does not expressly provide to the contrary.[47] One reason is to economize on

42. *See* §4.2.3, below.
43. *See* §4.2.1, below.
44. *See* §6.1, below.
45. U.S. 1976 Copyright Act §102(a)(7).
46. *Compare* Vaver 1986, 591 ("A state that defines works more broadly than required under the RBC [Revised Berne Convention] is neither obliged nor entitled by the RBC to extend national treatment for these works, nor is it obliged or entitled to claim national treatment for these in another RBC state.") *with* Nordemann 1989, 301 ("Similarly, it devolves solely upon the national jurisdiction of that country of protection to decide whether or not specific products originating from a person's intellectual creation are to be regarded as 'literary or artistic works' within the meaning of the law of the country of protection. If they are to be so regarded, then the country of protection is *obliged* to grant national treatment to the authors from other member countries of the Convention; for they enjoy, according to Article 5(1) of the Berne Convention (Paris Act) in all countries 'the rights which their respective laws do now or may hereafter grant to their nationals,' and according to Article II of the U.C.C. (Paris Act) the 'same protection' as the national of the country of protection.").
47. Since protection in this case is a matter of national treatment and not minimum standards, the United States would not, however, be required to extend rights to sound recordings, such as the public performance right, that the Berne Paris Act requires as a minimum standard for protected classes of works. *See* Nordemann 1989, 303 ("For the question as to whether there exists any claim to national treatment in respect to the types of works which are not specifically listed in Article 2 of the Berne Convention, the sole criterion, according to all the foregoing, is whether the national law of the country of protection includes such types of works in the concept of literary or artistic works. On the other hand, it is irrelevant—as should be observed here for clarification—whether the national law of the country of protection also accords these types of work the same scope of protection as the other works, and thus gives the right owners the same rights and provides the same term of protection.").

line-drawing around rights and subject matter coming within the national treatment obligation. Another reason is respect for national autonomy and consequent deference to the legislature's motives in choosing to place the copyright label on that which, at lesser international expense, it could have called by a different name.

§4.2.1 The Trade Economics of National Treatment

An economic puzzle of international copyright is why a country that has adhered to a treaty such as the Berne Convention or the TRIPs Agreement will enact copyright or neighboring rights laws that surpass the minimum treaty standards, when the treaty's requirement of national treatment obligates it to give this same generous protection to foreign authors, even though the country's own authors will receive more limited protection in foreign countries that meet only the minimum treaty standards.

One answer lies in the different equations of cost and benefit that countries strike in their effort to achieve a favorable balance of copyright trade. As a rule, a country that is a substantial net exporter of creative work maintains higher than minimum levels of intellectual property protection in order to ensure the continued abundant production of the copyrighted goods that generate its export revenues. At the same time, countries that are net importers of creative goods and have more modest copyright industries will incline to award minimum levels of protection in order to conserve the outflow of national wealth to copyright-exporting countries. Because the relative margin of difference between the levels of protection offered in exporting and importing countries is so narrow (particularly since conclusion of the TRIPs Agreement), yet the imbalance in world copyright trade so great, the net exporting country can expect its total revenues, even from countries adhering only to minimum standards, to more than offset the revenues it sends to net importing countries to whose works it accords national treatment. Also, the community of interest between copyright industries in both net export and net import countries will usually weigh heavily in favor of heightened standards.[48]

General acquiescence in national treatment as a norm of international copyright relations will sometimes break down when a new technology produces a dramatic shift in the copyright balance of trade. A decade after the

48. This answer does not, however, explain why countries that are substantial net copyright importers, with little to gain from high standards in other countries, and much to lose from having any standards in their own, will adhere to a treaty imposing minimum standards; the phenomenon is better explained by history, trade pressures, and the incremental advantages that copyright confers in developing equality of opportunity between domestic and foreign authors.

1971 Paris Revision of the Berne Convention, the question remained open whether computer programs were "literary works" within the meaning of the treaty and consequently subject to the national treatment obligation. The question was effectively resolved only a decade later with the acceptance of computer programs as literary works under the terms of the TRIPs Agreement[49] and the WIPO Copyright Treaty.[50] Yet, it seems clear in retrospect that the struggle was less about whether computer programs could fit comfortably into Berne's definition of protectible subject matter than it was about whether the United States, the world's leading exporter of software, could use its trade leverage to tie software protection to Berne's high standards rather than the lower standards of alternative *sui generis* regimes.[51]

The question whether new technological means for exploiting copyright works fall within the rights that are subject to national treatment is no less vexed than the question of new technological subject matter.[52] Notably, the Berne Convention's national treatment rule refers to "the rights which their respective laws do now or may hereafter grant to their nationals," presumably contemplating not only objects and means of protection that existed at the time of the treaty's last revision, but also those that may arise in the future. Nonetheless, home audio and video recording of copyrighted entertainment products are two examples of new exploitation technologies that have in some economically important countries eluded not only national treatment but also minimum copyright treaty standards, finding a home instead in non-conventional regimes of protection.[53]

At one time, the question whether a new class of subject matter or a new right came within a treaty's national treatment obligation had practical legal consequence only in countries in which the treaty could be directly invoked in court and required no legislation to implement it.[54] With the economic obligations of the Berne Convention now part of the TRIPs Agreement and consequently subject to the dispute settlement procedures of the World Trade Organization, compliance with the national treatment obligation is more likely to be tested across a wider range of countries. In each case, the question whether a new form of subject matter or a new means of exploitation is subject to the national treatment requirement will be most appropriately answered in terms of the new object's proximity to the objects historically encompassed by the treaty.

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49. TRIPs Agreement Art. 10(1).
50. WIPO Copyright Treaty Art. 4.
51. *See* Dennis S. Karjala, *Lessons from the Computer Software Protection Debate in Japan*, 1984 Ariz. St. L. J. 53, 77–80.
52. *See* §4.2.2, below.
53. *See* §4.2.3, below.
54. *See* §3.1, above.

§4.2.2 "Works" Subject to National Treatment

§4.2.2.1 Berne Convention

Article 5(1) of the Berne Paris Act requires national treatment for authors "in respect of works for which they are protected under this Convention." "Works" presumably refers not only to the examples of "literary and artistic works" listed in Article 2(1), but also to any subject matter coming within the provision's inclusive phrase, "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression,"[55] whether the class of subject matter was known at the time of the 1971 Paris Revision or first came into existence at some later time. The breadth of the reference to "every production in the literary, scientific or artistic domain" implies that the pivotal question in any case will be the intended scope of the phrase.

The treatment of phonograms and computer programs illustrates how borderline subject matter is evaluated in order to determine whether it constitutes a "work" coming within the obligation of national treatment. At one time, some authorities viewed phonograms as "adaptations" and thus protectible works within the terms of the Berne Convention.[56] More recent commentary and national practice hold that phonograms are not works under the Berne Convention and are consequently not subject to the national treatment obligation.[57]

Computer programs were initially thought to be better suited for protection as industrial property than for protection as literary property, and in 1977 the World Intellectual Property Organization promulgated a set of *sui generis* "Model Provisions for the Protection of Computer Software."[58] By the early 1990s, however, many Berne Union members, including many of the more economically significant countries, had brought computer programs under their copyright legislation.[59] The consensus of the E.C. Software

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55. *See* §6.1, below.
56. *See, e.g.*, Ladas 1938, 424–425 (rejecting the characterization).
57. *See* Vaver 1986, 598–601. Professor Vaver has observed that many Berne Union members have also adhered to the Rome Convention, which permits members to apply a rule of material reciprocity, rather than national treatment, to phonograms—an approach that would violate Berne Article 5(1) if phonograms came within Berne's definition of "works." *Id.* at 598.
58. The Model Provisions are reprinted and discussed at 16 Industrial Property 259 (1977). *See also* Lawrence Perry, *The Legal Protection of Computer Software—The WIPO Model Provisions*, 1 E.I.P.R 34, 36–37 (1979).
59. *See* §6.1.2.9, below.

Directive,[60] the TRIPs Agreement,[61] and the WIPO Copyright Treaty[62] that computer programs are to be protected as "literary works" within the meaning of the Berne Convention has today effectively concluded the question of the copyrightability of computer programs as a matter of international law.

The history of phonograms and computer programs under the Berne Convention provides lessons to guide future determinations whether the 1971 Berne Paris Act compels national treatment for new classes of borderline creative works. One lesson is that patience is a virtue. It required at least a decade's experience with the marketplace for lawmakers to reach consensus on the intellectual property status of phonograms and computer programs.[63] A second lesson is that the question whether a new class of subject matter constitutes a Berne Convention "work" is connected to the questions whether and to what extent its effective protection can be secured by the minimum rights established by the Convention. For example, the E.C. Software Directive succeeded in accommodating copyright rules for software protection to Berne's minimum requirements.[64] Similarly, after some initial false starts, courts in the United States clarified traditional copyright doctrine to accommodate the special features presented by computer programs.[65] But the fact that copyright protection for computer programs placed unusual strains on copyright doctrines shaped by the Berne Convention's minimum standards, offers strong evidence of the care that should be taken in determining whether a new form of creative production in fact constitutes a Berne "work."

§4.2.2.2 TRIPs Agreement

Article 3(1) of the TRIPs Agreement ties its national treatment obligation to "the protection of intellectual property."[66] Article 1(2) defines "intellectual property" as "all categories of intellectual property that are the subject of

60. E.C. Software Directive Art.1(1).
61. TRIPs Agreement Art. 10(1).
62. WIPO Copyright Treaty Art. 4.
63. *See, e.g.*, Vaver 1986, 597 ("It would however be absurd and unreasonable, and thus contrary to the object of the RBC [Revised Berne Convention], if a state were treated as breaking its obligation to protect a new class of literary or artistic work from the moment that new class arose. In practice there is always a period of uncertainty as the various participants in a state's legal system—lawyers, courts, bureaucrats, interested parties, and the public—become aware of and start wrestling with the problem. The period may be long or short, depending on a country's state of development and the accidents of litigation. Legal and judicial opinions may initially conflict and some time may elapse before a final solution is reached.")
64. *See* Czarnota & Hart 1991, 141–151.
65. *See generally* Goldstein 1999, §2.15.2.
66. Article 3(1) subjects this obligation "to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits."

Sections 1 to 7 of Part II," including copyright and related rights,[67] trademarks,[68] geographical indications,[69] industrial designs,[70] patents,[71] layout designs of integrated circuits,[72] and protection of undisclosed information, or trade secrets.[73] Additionally TRIPs Article 9, requiring members to comply with Articles 1–21 and the Appendix of the 1971 Berne Paris Act, effectively adds the national treatment requirement of Berne Article 5(1) to the TRIPs obligation. Although TRIPs Article 3(1) does not require a member country to treat foreigners identically to nationals, it does require that their treatment be "no less favorable" than that given to nationals.

By defining the object of national treatment as a legal conclusion—"intellectual property"—rather than an objective fact—"literary and artistic works"—and bringing all the main fields of intellectual property within its reach, Article 3(1) of the TRIPs Agreement is by its terms more likely to encompass borderline literary and artistic works than is the Berne Convention. Nonetheless, the language of the TRIPs Agreement, like that of the Berne Paris Act, fails definitively to resolve a chronic quandary: whether new classes of subject matter fall within the national treatment obligation. As Paul Geller has observed, "This question is critical for knowing how far TRIPs panels may go in resolving disputes between W.T.O. members, as well as the principles that might guide them on the way."[74]

The question of database protection illustrates the difficulty of determining whether a hybrid mode of protection, such as the national legislation contemplated by the E.C. Database Directive,[75] that does not literally fall within the "intellectual property" categories of the TRIPs Agreement, is nonetheless subject to the national treatment obligation. On the one hand, the Directive's *sui generis* rights against "extraction" and "reutilisation" of data[76] do not fit neatly into any of Article 1(2)'s "intellectual property" categories. Indeed, the history of the Directive reveals a deliberate intention on the part of the European

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67. TRIPs Agreement, Section 1.
68. TRIPs Agreement, Section 2.
69. TRIPs Agreement, Section 3.
70. TRIPs Agreement, Section 4.
71. TRIPs Agreement, Section 5.
72. TRIPs Agreement, Section 6.
73. TRIPs Agreement, Section 7.
74. Paul Edward Geller, *Intellectual Property in the Global Marketplace: Impact of TRIPs Dispute Settlements?* 29 Int'l Lawyer 99, 105 (1995).
75. The E.C. Database Directive prescribes two tiers of protection for databases. Chapter II provides that "databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright." Art. 3(1). Chapter III provides, independent of copyright, a right to "prevent extraction and/or re-utilisation" of the contents of databases meeting prescribed criteria. Art. 7(1). *See generally* §6.2.4, below.
76. E.C. Database Directive Art. 7(1).

legislature to avoid the application of national treatment required under TRIPs, by designating the right as strictly "*sui generis*."[77] On the other hand, this approach to protection possesses some similarities to unfair competition law, including shared roots with aspects of copyright and trade secrets law covered by TRIPs Sections 1 and 7.[78]

Although resolution of this question is not free from doubt, publicly accessible, nonoriginal collections of data probably fall outside the boundaries of the seven categories of "intellectual property" contemplated by Article 3. Data are almost universally excluded from the scope of copyright subject matter and may well be expressly disqualified from copyright protection under the terms of TRIPs Article 9(2), which provides that "[c]opyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."[79] Similarly, although data will regularly come within the category of undisclosed information under TRIPs Section 7, any publicly accessible database will, by definition, be excluded from this category, which requires that the information be "secret" and have "been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret."[80] Finally, notwithstanding TRIPs Article 2(1)'s incorporation of Paris Convention obligations into its fabric, it seems unlikely that Paris Convention Article 10*bis*[81] will provide a ready gloss on TRIPs Article 1(2)'s definition of "intellectual property."

On balance, the better result in the case of legislation like that contemplated by the E.C. Database Directive is to withhold the national treatment obligation. Subjecting these and comparable database provisions to national treatment would in all likelihood curb a country's interest in creating such new legal systems, since to do so would obligate the country to protect databases from other member countries while receiving no assurance that databases of its own nationals will be protected abroad. The prospect of such imbalances in intellectual property trade is hardly calculated to encourage innovation in new forms of "effective and adequate protection of intellectual property rights," a stated object of the TRIPs Agreement.[82] At the same time, withholding national treatment would not materially undercut either of the

77. *See* Jens L. Gaster, *The EU Council of Ministers common position concerning the legal protection of databases: a first comment*, [1995] E.I.P.R. 259.
78. *See* Guido Westkamp, *TRIPS Principles, Reciprocity and the Creation of Sui-Generis-Type Intellectual Property Rights for New Forms of Technology*, 6(6) J. World Int. Prop. 827, 834 (2003).
79. TRIPs Agreement, Art. 9(2).
80. TRIPs Agreement Art. 39(2).
81. Paris Convention for the Protection of Industrial Property 1967, Art. 10*bis* (defining unfair competition as including "all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor.").
82. Preamble to TRIPs Agreement.

Agreement's two other objects: reducing "distortions and impediments to international trade" and ensuring "that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade."[83] In both respects, the very fact of the new system's novelty will tend to ensure the absence of dislocations in existing trade patterns.

§4.2.3 "Rights" Subject to National Treatment

The question whether a domestic scheme for compensating authors comes under the national treatment obligations of the Berne Convention or the TRIPs Agreement is controversial. A country that is a net importer of creative goods, and that is barred by the Berne Paris Act and the TRIPs Agreement from reneging on minimum rights and national treatment, will have an understandable motive to design a compensation system for authors that at once reduces its trade imbalance and eludes the national treatment obligations of the two treaties. Because the legislature can structure such a system discriminately, pinpointing uses that are the source of serious imbalances but excluding those that are not, this route can easily become an attractive trade strategy for net copyright exporters no less than for net copyright importers.

§4.2.3.1 Berne Convention

Statutory arrangements for rewarding authors do not always take the form of the exclusive rights contemplated by the Berne Convention. Government grants and other direct and indirect subsidies to authors, such as tax benefits, variously exist alongside such Berne minimum rights as reproduction, translation, and public performance. These subsidies are immune to the Berne Convention's national treatment obligation, not because they come from the government, but because they differ structurally from the "rights" contemplated by Article 5(1). However, other remuneration systems, such as the *droit de suite*, entitling an artist to a portion of the proceeds of his work on resale,[84] and levies that seek to compensate composers and film authors for the private copying of their works,[85] come closer to the margins of traditional copyright and directly raise the question whether Berne members are free to withhold the revenues generated by these laws from nationals of other member countries.

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83. *Id*.
84. *See* §9.1.2.4, below.
85. *See* §11.2.2, below.

Since it is the treaty text, not national law, that establishes the standards for national treatment,[86] the question whether a domestic compensation system, however it is labeled, comes within the national treatment obligation can be answered by tracing the system's operative elements against the profile of rights prescribed in the Berne Text.[87] Characterized at the highest useful level of abstraction, an economic right subject to national treatment under the 1971 Berne Paris Act consists of three elements: it is effective against the world at large; it enables the author to control, or benefit from, the use of a literary or artistic work; and it values the use of the work, however roughly, proportionately to the work's success or prospective success in the marketplace.[88] The presence in a domestic compensation system of any one of these attributes will indicate that national treatment may be required; the presence of all three will indicate that it must be extended.

Statutory levies imposed on copying equipment or materials such as photocopy machines, audio and video recorders, and blank media, for redistribution to copyright owners to compensate for private copying of copyrighted works, will frequently bear all three hallmarks of a right under the Berne Convention subject to national treatment.[89] Since the levies are independent of any contract relationships and are imposed on all equipment or all materials, the remuneration obligation approximates a right effective against the world. Second, the systems are specifically designed to enable authors to benefit from, although not control, the use of their works. Finally, depending on the sampling method employed, copyright owners will enjoy revenues roughly proportionate to their work's success in the marketplace. The fact that these equitable remuneration systems seek to effectuate authors' rights in situations where transaction costs would make an exclusive right impractical also arguably places them within the Berne methodology contemplated by Article 9(2) of the 1971 Paris Act.[90]

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86. As discussed in §4.2, above, copyright and neighboring rights treaties provide the floor, not the ceiling, for national treatment. A treaty member may characterize any compensation system as copyright or a neighboring right, and thus entitle qualifying foreign nationals to share in the system proceeds.

87. The national treatment rules of the Rome Convention and the WPPT are less generous since they limit national treatment to "rights specifically granted" by these instruments. Also deliberate use of the term "exclusive rights" in WPPT Art. 4(1) seems to rule out obligatory national treatment in respect of remuneration rights other than the right to equitable remuneration expressly mentioned in Art. 4(1). *See* J. Reinbothe & S. von Lewinsky, The WIPO Treaties 288 (2002).

88. *See generally* Burger 1988, 500–01; Steup 1978, 284. *See also* Vaver 1986, 717.

89. On the details of the operations of these systems, see §11.2.2, below. *See generally* Dillenz 1990; Burger 1988, 448; Steup 1978, 287.

90. *See* §11.1, below.

Many remuneration systems for private copying allocate a portion of their revenues to domestic social and cultural objects. *See* Dillenz 1990, 187. Although these arrangements

Droit de suite, or the resale royalty right, does not squarely fit the profile of Berne Convention rights,[91] which is doubtless one reason it has not been included as a minimum treaty right. It was, though, added as an optional right in the 1948 Brussels Act and was made subject to a rule of material reciprocity.[92] *Droit de suite* is, to be sure, effective against the world at large and is valued according to market standards. The doctrine's central deviation from rights subject to national treatment, at least under the Berne Convention, is that it pivots not on the exploitation of intangible works, but on the disposition of tangible goods—the copy or other material support in which the work is embodied. *Droit de suite* is most closely akin to copyright law's distribution right, which, unlike the reproduction, adaptation, and performance rights, is also not a minimum standard in the Berne Paris Text and has been only imperfectly reflected in the national laws of member countries.[93]

National public lending right systems that provide revenues to authors for the otherwise uncompensated lending of their books are, like *droit de suite*, closely analogous to the distribution right.[94] Some countries that have adopted a public lending right have structured it as essentially a social welfare system, disconnected from any of the three elements that characterize rights under the Berne Convention; indeed, in these countries, to call the entitlement a "right" would be a misnomer. Public lending rights and other compensation systems that do not conform to the profile of Berne rights may nonetheless be characterized as part of copyright under local law and made available to foreigners on the same basis as they are to nationals.[95]

Electronic copyright licenses governing the terms of use of copyrighted works in electronic databases will, in their capacity for massive, low-cost dissemination, approach the profile of rights effective as against the world.[96]

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will characteristically deny foreign authors participation in the revenue pool, they probably do not violate the national treatment rule since national authors, even if allowed to participate in the revenue pool, will not do so on the differentiated terms that characterize copyright or author's right. Consequently, if these systems violate any treaty obligations it is the minimum treaty standard imposed for the right in issue, and not the national treatment rule.

Comparable questions arise in connection with the operation of collecting societies, which will often allocate part of their net revenues to local cultural objects. *See generally* Ferdinand Melichar, *Deductions Made by Collecting Societies for Social and Cultural Purposes in Light of International Copyright Law*, 22 I.I.C. 47 (1991).

91. *See* Paul Katzenberger, *The Droit de Suite in Copyright Law*, 4 I.I.C. 361, 378–379 (1973); Steup 1978, 284–288. *But see* Ladas 1938, 266–269.
92. The provision, which originated as Article 14*bis* of the Brussels Act, is Art. 14*ter* of the 1971 Berne Paris Act. *See generally* §9.1.2.4, below.
93. *See* §9.1.2, below.
94. On the public lending right generally, see §9.1.2.3, below.
95. Germany's public lending right, for example, is included in the country's Copyright Act and is applied to benefit foreigners as well as nationals. *See* §9.1.2.3, below.
96. *See generally* Goldstein 1997.

Are local rules that govern these licenses subject to the national treatment obligation? Apart from Article 14*bis* of the Berne Paris Act, allocating presumptions of ownership for cinematographic works, the Berne Convention provides no rules on copyright contracts. As a consequence, member countries would appear to be free under the treaty to subject foreign nationals to contract rules that differ from the contract rules they apply to their own nationals.[97] Although this suggests that mass electronic licenses should be free of the national treatment obligation, the fact that these licenses mimic full-fledged Berne rights in their effect suggests that a WTO panel that values substance over form may decide to subject them to the national treatment requirement.

§4.2.3.2 TRIPs Agreement

The national treatment requirement of the TRIPs Agreement[98] encompasses a broader range of rights than the Berne Convention. The obligation pivots not on rights "in respect of works," as does Berne, but on the "protection of intellectual property," defined to include all categories of intellectual property that are the subject of the Agreement.[99] Further, a footnote to the TRIPs Agreement's national treatment requirement provides that "protection [of intellectual property] shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement."[100]

TRIPs Article 3(1) subjects its national treatment obligation to the exceptions already provided in, respectively, the Berne and Rome Conventions, among others, and in the case of performers, producers of phonograms, and broadcasting organizations makes a member state's national treatment obligation apply only "in respect of the rights provided under this Agreement"—specifically, the rights prescribed in Article 14.[101] This means that no member will as a consequence of TRIPs be required to grant neighboring rights found in the Rome Convention, but not in TRIPs Article 14. For example, the Federal Republic of Germany, which has adhered to the Rome Convention, would have no obligation to protect a national of the United States, which has not adhered to the Rome Convention, against the performance of a phonogram embodying the U.S. national's contributions, unless the phonogram had some point of attachment other than nationality in a Rome country.[102]

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97. *See* Kerever 1993, 88; Ricketson 1987, 202. *See generally* §4.4, below.
98. TRIPs Agreement Art. 3(1).
99. TRIPS Agreement Art. 1(2).
100. TRIPs Agreement Art. 3(1) n. 3.
101. *See* P. Katzenberger, *TRIPS and Copyright Law*, *in* Beier & Schricker 1996, 59.
102. *See* §5.5.1, below.

However, Germany would be obligated to protect the same U.S. performer against the unauthorized communication to the public of a live performance as prescribed in TRIPs Article 14(1).

§4.2.4 Most-Favored-Nation Requirement

Article 4 of the TRIPs Agreement provides that "[w]ith regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members."[103] This provision represents the first time that the most-favored-nation mechanism, a common feature of international trade agreements, has been incorporated in a multilateral intellectual property agreement. Previously, such provisions had appeared only in bilateral copyright agreements.[104]

TRIPs Article 4's most-favored-nation requirement closely parallels the national treatment obligation imposed by TRIPs Article 3. Where Article 3 prohibits a member state from treating the nationals of any other member state less favorably than it treats its own nationals, Article 4 prohibits a member state from treating the nationals of another member state less favorably than it treats the nationals of any other country. National treatment requires a country to give the creative goods of foreign nationals the same rights and remedies it gives to the intellectual goods of its own nationals; most-favored-nation treatment requires the country only to treat all foreign creative goods equally, allowing it to favor the creative goods of its own nationals if it wishes.

§4.2.4.1 "Works" Subject to Most-Favored-Nation Requirement

Article 4 anchors its operation in the same TRIPs definition of the term "intellectual property" as Article 3—Article 1(2)'s reference to "all categories of intellectual property that are the subject of Sections 1 to 7 of Part II." Nonetheless, the distinctive policies behind the most-favored-nation principle may alter the meaning of the term for purposes of Article 4. Unlike Article 3, which aims at equality of treatment between the nationals of the protecting country and those of another WTO member, Article 4 aims at equality of treatment across WTO members. This suggests that expanding an intellectual property category to include new forms of protection creates a greater risk of impairing trade in the context of Article 4 than it does in the

103. TRIPs Agreement, Art. 4
104. *See* Ladas 1938, 66. *See also* §3.1.1, above.

context of Article 3, and requires giving a narrower compass to intellectual property for purposes of Article 4 than for purposes of Article 3.

The question of protection for nonoriginal collections of data raises the same kinds of questions in the context of Article 4 as it does in Article 3. Can a member state enter into an arrangement with another country under which each agrees to protect the publicly accessible, nonoriginal elements of databases created by nationals of the other country, without immediately and unconditionally extending protection over the same subject matter to nationals of all WTO member states? A conclusion that protection for nonoriginal collections of data comes within Article 1(2)'s definition of intellectual property, and consequently within the terms of Article 4, could have serious implications for countries that have implemented the 1996 E.C. Database Directive into positive law, effectively obligating them to extend database protection not only to other E.C. Members, but to all members of the WTO. Were this the case, E.C. countries could effectively escape the most-favored-nation mandate only by qualifying for one of Article 4's four exemptions.

§4.2.4.2 Exemptions from Coverage

Three of the four exemptions that Article 4 carves out from the most-favored-nation obligation directly affect interests under copyright or neighboring rights.[105] The first of the three, Article 4(b), exempts any advantage, favor, privilege, or immunity "granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country." Effectively, this provision transplants the national treatment exceptions under the Berne and Rome Conventions to the field of most-favored-nation treatment. In the case of the Berne Convention, this exemption would validate less than universal WTO protection for *droit de suite*[106] and works of applied art.[107] Similarly, it would allow less than universal WTO protection for the full national copyright term rather than the term applied in the country of origin, under the rule of the shorter term.[108]

Article 4(c)'s exemption for "any advantage, favour, privilege or immunity" accorded "in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement" encompasses rights guaranteed to performers by the Rome Convention but

105. The fourth exemption, in TRIPS Agreement Article 4(a), is for "any advantage, favour, privilege or immunity . . . deriving from international agreements on judicial assistance and law enforcement of a general nature and not particularly confined to the protection of intellectual property."

106. Berne Convention, 1971 Paris Text, Art. 14*ter*(2).

107. Berne Convention, 1971 Paris Text, Art. 2(7).

108. *See* §8.3, below.

not embodied in Article 14 of the TRIPs Agreement. Under this provision, a member state could extend the right to publicly perform a phonogram, a right that is guaranteed by the Rome Convention but not by the TRIPs Agreement, to nationals of less than all WTO countries without violating most-favored-nation treatment. Similarly, the generalized public distribution rights that the WIPO Performances and Phonograms Treaty, but not TRIPs Article 14, guarantees to performers and phonogram producers are not subject to the most-favored-nation obligation.

Article 4(d) exempts any advantage, favor, privilege, or immunity "deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement."[109] Apart from being subject to the same definitional quandary as the first sentence of Article 4—What does the Agreement mean by "intellectual property"?—Article 4(d) raises two interpretational questions. One question arises in connection with the Rome Convention, which, though clearly an intellectual property agreement that preceded the WTO Agreement, also guarantees rights that are not provided under the TRIPs Agreement and, to this extent, is exempt from the most-favored-nation obligation under Article 4(c). The canon of construction *expressio unius est exclusio alterius* suggests that the specific reference to the Rome Convention in Article 4(c) takes precedence over the more general reference so that, at least to the extent prescribed by Article 4(c), the Rome Convention would fall outside Article 4(d)'s two provisos.

The second, more consequential, question of interpretation under Article 4(d) concerns the status of European Union intellectual property directives promulgated and implemented before or after the WTO Agreement's entry into force. The fact that directives are not "agreements" under the terms of Article 4(d) suggests that they are not subject to the exemption. But neither are directives positive law, a fact that may exclude them from the operation of Article 4 altogether, although their implementations into the national laws of the member states certainly are positive law.[110]

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109. Article 4(d)'s first proviso, "that such agreements are notified to the Council for TRIPS" is essentially ministerial. The second proviso, that the agreements "not constitute an arbitrary or unjustifiable discrimination against nationals of other Members," requires interpretation. The proviso's two operative criteria—"arbitrary" and "unjustifiable"—will in all likelihood be applied according to the principles that animate the TRIPs Agreement generally.

110. One commentator has noted the possibility of regarding the entire E.C. Treaty as "an international agreement related to the protection of intellectual property" even though this conclusion would likely stretch the meaning of that term beyond the likely contemplation of Article 4(d). Herman Cohen Jehoram, *The E.C. Copyright Directives, Economics and Authors' Rights*, 25 I.I.C. 821, 827 (1994).

Certainly, the much-discussed *Phil Collins* decision of the European Court of Justice, Phil Collins v. Imtrat Handelsgesellschaft mbh, Joined Cases C-92/92 and C-326/92, 3 C.M.L.R. 773 (1993), whatever its implications for national treatment of intellectual property within

§4.3 Jurisdiction

The procedural rules of the forum in which a copyright case is heard can determine the outcome of the case. Forum rules govern not only the procedural aspects of a case, from pretrial procedures through exhaustion of appeals; forum rules on choice of law—also called conflicts of law, or private international law—will control the substantive law that applies to the dispute. Parties to international copyright contracts regularly include in their agreements not only a choice of forum clause, designating the forum that will hear disputes arising out of the contract, but also a governing law clause to control the forum's choice of law. Ultimately, however, forum law is supreme and will in certain circumstances supersede a choice of forum or a choice of law clause.[111]

Rules on choice of forum and choice of law in copyright cases have not been immune to change in the general legal environment. The evolving principle of territoriality in international copyright cases has affected contemporary rules on choice of forum and choice of law.[112] Rules are in flux respecting when a forum may accept or reject jurisdiction in a copyright case with international elements.[113] In Europe, the procedural innovations of the Brussels and Lugano Agreements on Jurisdiction and Enforcement of Judgments, now codified in E.C. Regulation No. 864/2007,[114] may significantly reshape jurisdiction practice in copyright cases. The spread of global information networks, carrying unprecedented quantities of copyrighted works across national borders at unprecedented speed, will accelerate these legal currents but perhaps not change them.[115]

Choice of forum can significantly affect the outcome of a copyright infringement or breach of contract case. Apart from the fact that a forum's choice of law rules will determine the substantive law applicable to the case, forum law will govern the availability and scope of personal jurisdiction and other procedural incidents affecting the cost, efficiency, and completeness of the litigation such as discovery, jury trial, and enforcement of judgments. The national treatment provisions of the copyright conventions and the TRIPs Agreement generally ensure that the forum will select the law of the protecting country to

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the Community, is not dispositive on the proposition that the E.C. Treaty is an intellectual property treaty. *See* Paul Katzenberger, *TRIPs and Copyright Law*, *in* Beier & Schricker 1996, 59 78–79.

111. *See* §§ 4.3.4, 4.4, below.
112. *See* §4.1.2, above.
113. *See* §4.3, below.
114. *See* §4.3.1.2, below.
115. *See generally* Jane Ginsburg & Myriam Gauthier, *The Celestial Jukebox and Earthbound Courts: Judicial Competence in the European Union and the United States Over Copyright Infringements in Cyberspace*, 173 R.I.D.A. 61 (1997).

govern the copyright aspects of the case; but different fora may apply different choice of law rules to contract aspects of the case. Further, a forum may entirely decline jurisdiction over a case if it characterizes copyright infringement as a local rather than a transitory cause of action. The salience of these considerations explains the regular inclusion of choice of forum clauses in international copyright agreements.

§4.3.1 Subject Matter Jurisdiction

§4.3.1.1 Common Law Traditions; Copyright Infringement as a "Local" or "Transitory" Action

English courts have historically applied the territoriality principle stringently in order to limit, if not entirely to reject, judicial jurisdiction over copyright infringements that occur beyond the country's borders. *Tyburn Productions Ltd. v. Conan Doyle*[116] invoked the distinction between "transitory" and "local" actions to reject jurisdiction over an action for a declaration that certain foreign acts did not infringe copyright. Plaintiff, a British film production company, had begun production of a film featuring the characters Sherlock Holmes and Dr. Watson as depicted in the stories of Sir Arthur Conan Doyle. Doyle had died in 1930, so that the Holmes stories had fallen into the public domain in England in 1980 under the then-applicable copyright term, but not yet in the United States, where Doyle's daughter, Lady Bromet, had previously asserted rights against plaintiff's distribution of earlier Holmes films in the United States. Evidently believing it would be unable to obtain a declaratory judgment under U.S. law, plaintiff sought a declaration of rights in England.

The Chancery Division, in an opinion by Justice Vinelott, ruled that English courts had no jurisdiction to hear the case. The principal rationale for the decision was that copyright infringement, like trespass to land, is a "local" rather than a "transitory" cause of action and is consequently not justiciable outside the jurisdiction in which it arises, in this case the United States. The court borrowed the analogy between foreign copyrights and foreign real property from an Australian decision, *Potter v. Broken Hill*,[117] holding that patent infringement is a local rather than a transitory cause of action. Justice Vinelott cited the rationale given in *Potter v. Broken Hill* as the main reason for declining jurisdiction in foreign real property, patent, and copyright actions: "The principles of international law, which systematizes the comity of nations, generally recognize that the Courts of a country will not inquire

116. 1 All E.R. 909 (1990).
117. Potter v. Broken Hill Pty. Co. Ltd., 3 C.L.R. 479 (High Court of Australia) (1906).

into the validity of the acts of a foreign State, except subject to well-known limitations."[118]

A second ground for decision in *Tyburn v. Conan Doyle* was the "double-actionability" rule as then formulated in the leading English conflicts treatise: "As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and (b) actionable according to the law of the foreign country where it was done."[119] Although the appropriation of the Conan Doyle characters would presumably have been actionable under U.S. law, thus meeting the second requirement of the double-actionability test, it would not have been actionable in England, so that it failed the first requirement.[120]

E.C. Council Regulation No 44/2001 of 22 December 2000, which replaced the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments, has directly binding force of law in the Member States of the European Union, including the United Kingdom.[121] The Regulation circumscribes the treatment of copyright infringement as a local rather than a transitory cause of action by subjecting European Community defendants to suit in the courts of their domicile, at least if the infringement occurred in another member state.[122] Legislation in England has since undermined the double-actionability rule by making the *lex loci delicti* generally applicable to tort actions,[123] and some judicial inclination exists to limit *Tyburn v. Conan Doyle*.[124] Nonetheless, the earlier English rules continue to have force in international practice. Common law rules formulated in England have radiated through other common law countries.[125] Also, Professor Cornish has proposed a prudential trimming of the "local action" rule to balance its benefits, rooted in territoriality, against the benefits of the Brussels and Lugano Conventions, rooted in regional commerce.[126]

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118. Potter v. Broken Hill Pty. Co. Ltd. 3 CLR 479, 510 (1906). *See generally* Wadlow 1998, 360–81 (1998).
119. 1 All. E.R. 916 (1990), quoting from Dicey & Morris, The Conflict of Laws 935 (10th ed. 1980).
120. *See also* Def Lepp Music v. Stuart-Brown (1986) R.P.C. 273. *See generally* Richard Arnold, *Can One Sue in England for Infringement of Foreign Intellectual Property Rights?*, 12 E.I.P.R. 254 (1990).
121. Civil Jurisdiction and Judgments Act 1982 (as amended 1991) §2(1).
122. *See* Stuart Dutson, *The Internet, Conflict of Laws, International Litigation and Intellectual Property: The Implications of the International Scope of the Internet on Intellectual Property Infringements*, 1997 J.B.L. 495, 506–07.
123. Private International Law (Miscellaneous Provisions) Act 1995, Part III §11(1).
124. *See* Pearce v. Ove Arup Partnership Ltd., Court of Appeal (Civil Division) [1999] All E.R. 769, [1999] F.S.R. 525.
125. *See* Cornish 1996a, 287.
126. Cornish 1996a, 288–89.

In the United States, a jurisdictional statute authorizing federal district courts to hear actions "arising under any Act of Congress relating to . . . copyrights" effectively gives these federal courts of first instance jurisdiction over copyright cases that possess foreign elements so long as they also involve an act of infringement inside the United States.[127] U.S. courts may also exercise so-called diversity jurisdiction over copyright cases that have only foreign, and no domestic, elements under another provision of the jurisdictional statute, encompassing cases between citizens of the United States and citizens or subjects of a foreign state.[128]

In *London Film Productions Ltd. v. Intercontinental Communications, Inc.*,[129] a suit by a British copyright owner against a New York licensor for copyright infringements in six Latin American countries but not in the United States, the court ruled that copyright infringement is a transitory cause of action so that, in light of the diverse citizenship of the parties, the foreign infringements were subject to jurisdiction in U.S. district court. The court distinguished earlier decisions, such as one that refused jurisdiction over a Canadian trademark infringement action that would have entailed inquiry into Canada's registration of the trademark in suit; in the case of copyright, the court ruled, "there is no danger that foreign courts will be forced to accept the inexpert determination of this Court, nor that this Court will create 'an unseemly conflict with the judgment of another country.' The litigation will determine only whether an American corporation has acted in violation of a foreign copyright, not whether such copyright exists, nor whether such copyright is valid."[130] The court also declined to dismiss the case on the ground of *forum non conveniens* since there was no foreign forum in which the defendant was subject to personal jurisdiction.[131]

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127. 28 U.S.C. §1338(a).
128. 28 U.S.C. §1332(a)(2). *See, e.g.*, Boosey & Hawkes Music Publishers Ltd. v. Walt Disney Co., 145 F.3d 481, 491–92 (2d Cir. 1998) (rejecting claim of *forum non conveniens* and vacating dismissal of foreign copyright claims.); Creative Tech., Ltd. v. Aztech Systems PTE, Ltd., 61 F.3d 696, 702 (9th Cir. 1995) ("This Court has recognized the potential of American courts to entertain actions under the copyright laws of other nations."); London Film Productions Ltd. v. Intercontinental Communications, Inc., 580 F.Supp. 47, 49 (S.D.N.Y. 1984). *But see* ITSI T.V. Productions v. California Authority of Racing Fairs, 785 F.Supp. 854, 866 (E.D. Cal. 1992) ("Although one district court has accepted jurisdiction over an action for foreign copyright infringement [citing London Film Productions v. Intercontinental Communications], I discern no clear authority for exercising such jurisdiction.").
129. 580 F.Supp. 47 (S.D.N.Y. 1984).
130. 580 F.Supp. at 49–50.
131. 580 F.Supp. at 50. *See also* §4.3.2, below.

§4.3.1.2 Civil Law Tradition; the Brussels Regime

Historically, and even before the Brussels and Lugano Conventions were concluded, the civil law countries of Europe have been more hospitable than common law countries to jurisdiction over foreign copyright actions.[132] The difference between common law and civil law approaches to jurisdiction in foreign copyright cases should not, however, be exaggerated.

The rules on jurisdiction in Europe are currently governed by a trio of instruments: the 1968 Brussels Convention,[133] the E.C. Council Regulation No. 44/2001 that largely replaced the Convention,[134] and the 1988 Lugano Convention,[135] which extends the Brussels jurisdictional framework to the EFTA states (including Norway, Iceland, and Liechtenstein). The Brussels regime provides as its jurisdictional pivot that persons domiciled in a member state are subject to suit in the courts of that state, regardless of their nationality, and may be sued in the courts of another member state only as specifically allowed by these instruments.[136] Two exceptions to the general rule are that a person domiciled in one member state may be sued in another member state "in matters relating to a contract, in the courts for the place of performance of the obligation in question"[137] and, "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur."[138] For example, an American national domiciled in Germany who infringes a copyright in Italy will be subject to suit both in Germany, where he is domiciled, and in Italy, where the tort occurred.[139] Another exception allows ad hoc jurisdiction for provisional measures, such as the interim injunctions that are routinely requested and provided for in copyright litigation in most E.U. Member States. The Brussels regime does not however apply to defendants not domiciled in a member state; in such cases national rules on jurisdiction will designate the appropriate forum.[140]

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132. *See* Reimann 1995, 75–81.
133. European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, September 27, 1968 ("Brussels Convention"), 8 I.L.M. 229 (1969).
134. Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 12/1 of January 16, 2001 ("Brussels I Regulation").
135. European Communities-European Free Trade Association: Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, September 16, 1988 ("Lugano Convention"), 28 I.L.M. 620 (1989).
136. Brussels I Regulation, Art. 2–3.
137. Brussels I Regulation Art. 5(1).
138. Brussels I Regulation Art. 5(3).
139. *See* Ulmer 1978, 16.
140. For proceedings concerning "the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered" Brussels I Regulation Art. 22(4) vests exclusive jurisdiction in the courts of the member states where deposit or registration

§4.3.2 Forum Non Conveniens

As a rule in common law jurisdictions, but not in civil law jurisdictions, copyright lawsuits with foreign elements are subject to discretionary stay or dismissal on the ground of *forum non conveniens*. Japan, with its own legal culture, has a "special circumstances" doctrine that in many respects resembles *forum non conveniens*.[141] Another important exception is British practice under the Brussels regime, which does not permit a *forum non conveniens* defense. Therefore, British courts will decline to apply the doctrine in cases subject to the Brussels rules, that is where the alternative forum is another E.U. country. British courts may apply the doctrine, however, if the alternative forum is not subject to the Brussels regime.[142]

As its name implies, the doctrine of *forum non conveniens* applies in situations where it would be appropriate—to promote justice and the convenience of the parties—for a case to be heard in a different forum. The leading British case, *Spiliada Maritime Corp. v. Cansulex Ltd.*,[143] which has strongly influenced the doctrine in other Commonwealth countries, ruled that "a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e., in which the case may be tried more suitably for the interests of all parties and the ends of justice."[144] A defendant who invokes *forum non conveniens* bears the burden of demonstrating that some other forum is both available and more appropriate; if the defendant makes this showing, the burden shifts to the plaintiff to demonstrate that "there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country."[145]

Forum non conveniens practice in the United States is somewhat more flexible than in other common law countries. Unlike English courts, courts in the United States indulge a presumption in favor of their own national's choice of forum but not in favor of a foreign plaintiff's choice of forum.[146] This presumption arguably offends the national treatment requirement in

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has occurred. Because copyrights arise without formalities in the E.U. Member States, this rule does not apply to cases involving copyrights.

141. *See* J.J. Fawcett, *General Report*, *in* Fawcett 1995, 18.
142. Re Harrods (Buenos Aires) Ltd. [1992] (Court of Appeal) 4 All E.R. 334, 342–43 (1991). *See generally* Richard G. Fentiman, *Jurisdiction, Discretion and the Brussels Convention*, 26 Cornell Int'l L. J. 59 (1993).
143. [1987] AC 460.
144. [1987] AC at 476.
145. [1987] AC at 476.
146. J.J. Fawcett, *General Report*, *in* Fawcett 1995, 16. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981).

cases where the foreign plaintiff is a national of a country with which the United States has treaty relations imposing a national treatment obligation. Resolution of the national treatment question in any case will turn on the precise wording and intent of the national treatment requirement in issue and the materiality of the presumption to disposition of the case. If the treaty provision requires only equality in application of substantive rights and not in access to courts, the presumption will not violate the requirement.[147] Also, in many cases, the nationality of the plaintiff will be just one of several independently dispositive factors weighing in favor of the *forum non conveniens* claim.

The American version of *forum non conveniens* has two requirements. First, a court will dismiss a claim involving foreign copyright law only if, notwithstanding the presumption favoring a U.S. plaintiff that sues in its home forum, the defendant can show that an adequate alternative forum exists to hear the dispute.[148] A defendant can make the required showing of an adequate alternative forum only if it can demonstrate that it is susceptible to process in another forum. Further, it will fail in its defense if the alternative forum would not give the plaintiff a satisfactory remedy.[149]

As a second requirement to a finding of *forum non conveniens*, the defendant must show that the balance of private and public interests favors dismissal.[150] Private-interest factors include relative access to evidence, availability of process to compel attendance of hostile witnesses, the cost of transporting friendly witnesses, and any other factors affecting a prompt and economical trial.[151] Public-interest factors include court congestion, local interest in the controversy, a forum's preference for applying familiar law, and avoidance of choice of law problems.[152]

Creative Technology, Ltd. v. Aztech Systems PTE Ltd.[153] illustrates how U.S. courts apply the *forum non conveniens* doctrine to copyright cases with a foreign element. Plaintiff and defendant, both Singapore nationals, manufactured computer sound cards in Singapore, marketing them in the United States

147. *See*, *e.g.*, Murray v. British Broadcasting Corp., 81 F.3d 287, 293, (2d Cir. 1996) (equal access to courts will not be required unless treaty expressly requires it; "the Berne Convention's national treatment principle insures that no matter where Murray brings his claim, United States copyright law would apply to exploitation of the character in this country.").
148. *See* Lockman Foundation v. Evangelical Alliance Mission, 930 F.2d 764, 767 (9th Cir. 1991); Boosey & Hawkes Music Publishers Ltd. v. Walt Disney Co., 146 F.3d 481, 491 (2d Cir. 1998). *See generally* Ellis 1996.
149. Lockman Foundation v. Evangelical Alliance Mission, 930 F.2d at 764, 768 (9th Cir. 1991).
150. *See* Lockman Foundation v. Evangelical Alliance Mission, 930 F.2d 764, 767 (9th Cir. 1991). Boosey & Hawkes Music Publishers Ltd. v. Walt Disney Co., 145 F.3d 481, 491–92 (2d Cir. 1998). *See generally* Ellis 1996.
151. Lockman Foundation v. Evangelical Alliance Mission, 930 F.2d at 764, 769 (9th Cir. 1991).
152. 930 F.2d at 771.
153. 61 F.3d 696 (9th Cir. 1995).

through wholly owned subsidiaries. Plaintiff, which owned the U.S. copyrights in a series of sound cards, filed suit for infringement in the Northern District of California, alleging the unauthorized manufacture and distribution of clones of its sound cards. The parties had settled earlier litigation in Singapore, but that settlement had been repudiated, and the Singapore litigation had been restarted by defendant. The Ninth Circuit Court of Appeals held that the district court had not abused its discretion by dismissing the case on the ground of *forum non conveniens*.

Under the first requirement for *forum non conveniens*, the court of appeals determined that Singapore was an adequate alternative forum for the lawsuit because the defendants were amenable to process there and because the Singapore Copyright Act's "lack of extraterritorial reach" should not prevent the High Court of Singapore from applying U.S. copyright law to plaintiff's claims or "from subsuming the amount of damages incurred by Aztech Labs' alleged illegal distribution of pirated sound cards within the United States in the amount of damages awarded under the Singapore Copyright Act for Aztech's alleged infringing acts occurring in Singapore."[154] Under the second *forum non conveniens* requirement, the court found that private factors (parallel litigation in Singapore, location of records and witnesses there) and public-interest factors (neither American goods or companies were involved) weighed in favor of dismissal.[155]

§4.3.3 Hard Cases

Complex problems of jurisdiction arise where acts of copyright infringement occur in more than one country;[156] and where one element of an infringement occurs in one country and another occurs in a second country.[157]

§4.3.3.1 Where Acts of Infringement Occur in More than One Country

Once relatively rare, infringement of the same work by the same defendant in different countries promises to multiply with the increased global use of digital transmission networks. If a copyrighted work is copied without authority in both Country *A* and *B*, and lawsuits are filed in both countries, which forum, if either, takes precedence? If suit is first filed in Country *A*, can

154. 61 F.3d at 702.
155. 61 F.3d at 703–04.
156. *See* §4.3.3.1, below.
157. *See* §4.3.3.2, below. *See generally* Ginsburg 1997.

Country *A*'s rules on accounting for profits properly be applied to recovery of profits earned in Country *B*?

a. Coordination of Jurisdiction

The fact that rights in the same work have allegedly been infringed by the same party in two or more countries may prompt a court in one country, as a matter of discretion, to stay local infringement proceedings until proceedings in the other country are concluded and, where the proceedings have been concluded, to apply the bars of *res judicata* or collateral estoppel as appropriate. However, while the copendency of infringement actions may lead to a discretionary stay, the law of civil procedure in the United States and most other countries does not require one forum to defer to the other. By contrast, the Brussels regime obligates courts of different member states to coordinate jurisdiction in related actions (*lis pendens*). Brussels I Regulation Article 27 provides: "(1)Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. (2) Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."[158]

In *Schmid Brothers Inc. v. Genossenschaft der Franziskanerinnen von Siessen e.V.*,[159] the German Federal Supreme Court ruled that two lawsuits, one in the United States and the other in Germany, both involving rights to reproduce and distribute a Hummel Christmas plate, were two fundamentally different lawsuits and, consequently, that the lower court had not erred in denying the plaintiff's objection of *lis pendens* based on the action in the United States. "From this territorial limitation of the copyright (and consequently also of the exploitation rights derived from this basic right) it follows that the alleged infringing acts in the Federal Republic of Germany—*i.e.*, the manufacture of reproductions of the work by Berta Hummel 'Angel with Candle' in the form of wall plates showing this motif—can only infringe upon the copyright granted by German law." By contrast, the suit brought against the plaintiff by the German defendant's licensee in the United States rested not on infringement of the German copyright but "exclusively on an alleged violation of the American copyright (under United States copyright law or

158. Brussels I Regulation Art. 27.

159. *Hummel Weihnachsteller 1971* ("Hummel Christmas 1971 Plate"), German Federal Supreme Court, Dec. 19, 1975 (Case No. I ZR 110/74), at 8 I.I.C. 276 (1977).

under common law)."[160] Under this approach, a *lis pendens* would presumably have been appropriate if the U.S. action had been for infringement of the German copyright in Germany.

b. Monetary Relief

The German Supreme Court in *Schmid Brothers* ventured somewhat afield from the strict territoriality approach it took to the question of *lis pendens* when it came to formulating the damage award to the defendant-counterclaimant. The court ruled that the defendant-counterclaimant's award should encompass an accounting for wall plates that, though manufactured in Germany, were distributed in the United States. Specifically, the accounting was to be "without any territorial limitations since defendants' royalty receipts payable by Goebel [its U.S. licensee] have been reduced through plaintiff's distribution abroad."[161] The German Supreme Court's approach in this respect coincides with a line of decisions awarding damages or profits under the U.S. Copyright Act for infringements occurring in other countries, so long as some act of infringement occurred in the United States.[162]

The rule that the copyright law of the protecting country should govern computation of monetary relief arising not only in the protecting country, but also in any other country where infringement occurred, fundamentally offends the territoriality principle. The determination whether damages are to be awarded for lost profits in a foreign jurisdiction properly turns on whether the foreign acts constituted copyright infringement under that country's laws. To award German or American copyright remedies for acts occurring outside those countries, without first determining whether those acts were infringing under foreign law, is necessarily to extend German or U.S. copyright law into the foreign jurisdiction.[163] Further, even if the acts in issue are infringing under the foreign law, the extent of economic injury in the foreign country can be properly measured only under that country's rules on

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160. *Id.* at 8 I.I.C. 277–78. *Compare* Computer Assocs. Int'l, Inc. v. Altai, Inc., 126 F.3d 365, 371 (2d Cir. 1997) (Collateral estoppel did not arise out of U.S. action because defendant failed to demonstrate that French and U.S. copyright standards "are 'identical' as required for application of collateral estoppel.").
161. *Id.* at 8 I.I.C. 280.
162. *See, e.g.*, Los Angeles News Service v. Reuters Television Int'l, Ltd., 149 F.3d 987 (9th Cir. 1998) (plaintiff could recover damages for foreign exploitation of copyrighted footage where the infringing acts occurred in United States); Update Art, Inc. v. Modiin Publishing, Ltd. 843 F.2d 67, 73 1784 (2d Cir. 1988). Under the American rule, the infringement in the United States need not be significant to trigger an award of damages incurred abroad. *See, e.g.*, National Enquirer, Inc. v. News Group News, Ltd., 670 F.Supp. 962, 970 (S.D. Fla. 1987) (distribution in the Unites States of 85 of 5,021,630 copies of foreign newspapers supported subject matter jurisdiction).
163. *See* Reindl 1998, 822 n. 80.

remedies, since the foreign country's rules on remedies will inevitably be connected to its rules on liability. This suggests that if any remedy is to be given for foreign infringement it should be the remedy prescribed under the foreign law.

The European Court of Justice has confronted the problem of computation of damages for a tort causing injury in multiple E.U. Member States in *Shevill*, a defamation case. Interpreting Article 5(3) of the Brussels Convention, the Court held that "the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised."[164]

The *Shevill* rule, which allows full recovery of damages in the country of the primary tort (*Handlungsort*), and only partial recovery in countries where the tort also has effect (*Erfolgsort*), is generally considered to apply as well to copyright infringements causing harm in multiple member states.

§4.3.3.2 Where Elements of Infringement Occur in More than One Country

Electronic marketing of copyrighted works has increased the occasions for a single copyright infringement to cross national boundaries. If, without authority, a broadcaster in Country *A* transmits a musical work to a satellite and the satellite signal is first received by the public in Country *B*, has the broadcaster infringed the work's copyright under the law of Country *A*, which makes public reception an element of the cause of action?[165] Has the

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164. Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA., European Court of Justice, March 7, 1995, Case C-68/93. *Compare* Consorts Wegmann v. Elsevier Science Ltd., Court of Cassation, 1st Civil Chamber, July 16, 1997, 176 R.I.D.A. 402 (1998) (where, under Article 5(3) of the Brussels Convention, action for compensation for infringement is brought not in the country of the defendant's domicile, but rather in the country where the infringement occurred, the court is competent to award compensation only for the harm suffered in the country where the infringement occurred).

165. *See, e.g.*, Composers, Authors and Publishers Association of Canada Ltd. v. International Good Music, Inc., 37 D.L.R. 2d 1, 7 (Canada Sup. Ct. 1963) (suggesting that in some circumstances "a person who operates a television transmitter outside Canada, but with the primary objective of transmitting programmes for reception in Canada, can be held to have . . . infringed the rights of the holder of the Canadian copyright in such works."); Allarcom Pay Television Ltd. v. General Instrument Corp., 69 F.3d 381, 387 (9th Cir. 1995) ("In this case, defendants either initiated a potential infringement in the United States by

broadcaster infringed under the law of Country *B*, which makes transmission an element of the cause of action? If, without authority, a film distributor in Country *A* authorizes a licensee in Country *B* to distribute motion picture videocassettes there, is the distributor liable for contributory infringement under the law of Country *A*, which makes an act of direct infringement a condition to recovery for contributory infringement?[166] In either case, the fact that Country *B* does or does not characterize the conduct occurring within its borders as an infringement and the fact that Country *B* does or does not have copyright treaty relations with Country *A*, may complicate resolution of the question.

Subafilms, Ltd. v. MGM-Pathe Communications Co.[167] illustrates one approach to liability where some, but not all, elements of a copyright infringement occur in a single country. Defendant, evidently believing that it owned the worldwide videocassette distribution rights for the motion picture *Yellow Submarine*, authorized licensees to distribute the videocassettes around the world. The U.S. district court hearing the case held that defendant did not in fact own the videocassette distribution rights and was consequently liable for the unauthorized distribution in the United States and abroad. The court of appeals reversed the second part of the decision, holding that the defendant was not contributorily liable for authorizing its putative licensees to distribute the videocassettes abroad. Adverting to the proposition that the U.S. Copyright Act has no extraterritorial force, the court ruled that "when the assertedly infringing conduct consists solely of the authorization within the territorial boundaries of the United States of acts that occur entirely abroad . . . such allegations do not state a claim for relief under the copyright laws of the United States."[168]

The *Subafilms* decision rests on a deceptively simple syllogism: acts occurring outside the United States do not constitute infringement under the U.S. Copyright Act; there can be no contributory infringement without direct infringement; therefore, there can be no contributory liability for acts of direct infringement occurring outside the United States. The flaw in this

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broadcasting the Showtime signal, which contained copyrighted material, or defendants authorized people in Canada to engage in infringement. In either case, the potential infringement was only completed in Canada once the signal was received and viewed. Accordingly, U.S. copyright law did not apply.")

166. *See, e.g.*, Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1094 (9th Cir. 1994) (alleged contributory infringer not liable under U.S. law where claimed direct copyright infringement occurred outside United States).

167. 24 F.3d 1088 (9th Cir. 1994).

168. 24 F.3d at 1089. *See also* Robert Stigwood Group Ltd. v. O'Reilly, 530 F.2d 1096, 1100 (2d Cir.), *cert. denied*, 429 U.S. 848 (1976) (defendant's assembly and arrangement in the United States of "all the necessary elements" for an unauthorized performance in Canada was not "an integral part" of the Canadian performance, so that plaintiff could not receive damages for Canadian performances).

logic is that, for purposes of the territoriality principle, all that matters is that some independently actionable conduct occur inside the territory of the protecting country, and defendant's actions of authorization presumably met this criterion. *Subafilms* can be further criticized on two practical grounds. First, wherever the direct infringements occurred, the acts of authorization in the United States clearly caused economic injury in the United States as measured by lost foreign revenues coming into the country. Second, by immunizing an alleged contributory infringer who orchestrated infringing conduct worldwide and effectively requiring the copyright owner to pursue separate actions against infringers in every other protecting country, the decision eliminated an opportunity for efficient control of international infringement.

What if the direct infringement occurs in the protecting country and the alleged contributory infringement occurs abroad? In this case, courts are more likely to hold that the act of contributory infringement comes within the subject matter jurisdiction of the protecting country on the ground that extraterritorial acts will be actionable when they are intended to, and do, have an effect in the protecting country.[169] For example, when a defendant in Germany affixed unauthorized labels to products, intending the products to be distributed in the United States where the acts would allegedly infringe plaintiff's exclusive distribution rights under the U.S. Copyright Act, a court in the United States held that "when a foreign corporation is alleged to have purposefully injected itself into the American market by shipping infringing goods here—regardless of whether it does so directly or through an importer—the defendant should not be allowed to use the principle of non-extraterritoriality to shield itself from the reach of American courts and American copyright law."[170]

The use of digital networks to transmit copyrighted works to individual recipients on demand raises issues of territorial jurisdiction comparable to those raised by the contributory infringement cases. The main difference is that an overly rigid conception of territoriality in this class of cases may result in the conclusion that no infringement has occurred anywhere, either under the law of Country *A*, from which the work is transmitted, or the law of Country *B*, where the work is received. If both countries require an act of transmission and an act of public reception as elements of copyright infringement, Country *A*'s law might hold that merely uplinking a work to a digital facility falls short of public reception, so that if no copy of the work is made, there will be no infringement in Country *A*. For its part, Country *B* may hold that the act of individual reception of signals within its borders does not encompass the necessary element of transmission so that there will also be no

169. *See* §4.1.1, above.

170. GB Mktg. USA, Inc. v. Gerolsteiner Brunnen GmbH & Co., 782 F. Supp. 763, 773 (W.D.N.Y. 1991).

act of infringement in Country *B*. As a result the aggregate, effectively infringing, conduct would lie entirely outside copyright control.

One solution to the problem of transnationally partitioned infringements is to employ an effects-based test of territoriality, under which the economic impact of transmission in one country and receipt in the other would suffice to establish prescriptive jurisdiction in both.[171] Another solution would be for a country to modify its substantive law in areas where such forms of appropriation are likely to recur. Country *A* could, for example, redefine its test of infringement so that uplinking a work for reception by individuals, either domestically or abroad, infringes the public performance right. The 1993 E.C. Satellite Directive takes one step in this direction by providing that the act of satellite communication to the public occurs "solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth."[172]

§4.3.4 Contractual Choice of Forum

The parties to a copyright contract can attempt to forestall forum shopping and achieve additional transactional certainty for their agreement by expressly providing that all disputes under the contract will be litigated in a specified forum. Civil law countries generally honor forum selection agreements,[173] and the Brussels regime expressly validates them subject to prescribed conditions.[174] Common law jurisdictions are somewhat more likely than civil law jurisdictions to overturn forum selection agreements, usually for reasons comparable to those entertained under *forum non conveniens* doctrine.[175] A widely followed English case, *The Eleftheria*,[176] held that an English court should as a rule stay a local action in order to allow the parties to proceed in the contractually designated foreign forum unless the plaintiff could show compelling reasons for proceeding locally. The U.S. Supreme Court has ruled that a forum selection clause should be enforced in the absence of a showing

171. *See* §4.1.1, above.
172. E.C. Satellite and Cable Directive Art. 1(2)(b). The Satellite Directive is considered in greater detail at §§9.1.4.3 and 9.1.4.4, below.
173. *See* Reimann 1995, 76 ("European Countries normally recognize [forum-selection clauses], though the extent to which they are permitted varies considerably and the respective statutes frequently require an agreement in writing.").
174. Brussels I Regulation Art. 23.
175. *See generally* J.J. Fawcett, *General Report*, *in* Fawcett 1995, 47–58.
176. 2 All E.R. 641 (1969).

that enforcement would be unreasonable and unjust.[177] However, even courts in civil law jurisdictions will decline to enforce choice of forum clauses where doing so would violate a strong domestic public policy.[178]

Local pleading rules will sometimes defeat a contract's selection of forum. In *Corcovado Music Corp. v. Hollis Music, Inc.*,[179] defendant traced its ownership of a musical work's U.S. renewal term to the composer's contract with his publisher specifying Brazil as the forum for litigating disputes under the agreement; plaintiff claimed title to the renewal term through a subsequent grant directly from the composer. Although the dispute turned on whether the first agreement had conveyed the renewal right to the defendant, defendant's claim based on the agreement was at best a defense to plaintiff's infringement action. Under pleading rules in the United States, the terms of the complaint control jurisdiction, and jurisdiction will not be defeated by an anticipated defense. "[W]here a plaintiff sues for copyright infringement and asserts no rights under a contract with the defendant containing a forum-selection clause, the forum-selection clause has no effect."[180]

§4.4 Conflict of Laws

Although the national treatment principle is sometimes perceived as a conflict of laws rule,[181] it is essentially no more than a rule barring discrimination against foreign right holders, which requires a country to apply the same law to works of foreign origin as it applies to works of its own nationals.[182] It is

177. *See* Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972).
178. J.J. Fawcett, *General Report*, *in* Fawcett, 54–55.
179. 981 F.2d 679 (2d Cir. 1993).
180. 981 F.2d at 682.
181. *See, e.g.*, France, Sisro v. Ampersand, Court of Cassation, March 5, 2002, 34 (2003) I.I.C. 701.
182. *See, e.g.*, Walter 1976, 46. ("[T]he principle of national treatment, as contained in article 4, par. 1, of the Berne Convention (Brussels Text), does not by its nature pertain to the rules of conflicting laws. Considered separately, that principle, in my view, concerns only the condition of foreigners and is meant to prevent treating nationals differently from foreigners from the standpoint of material rights, or national works from foreign works, within the field of application of the Convention. Indeed, equality of treatment still says nothing regarding the applicable law, and a legislation which defines the content and extent of copyright protection for both nationals and foreigners as being governed by the provisions of the country of origin would not be established at variance with the principle of national treatment."). *See generally* van Eechoud 2003.

See also Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 89 n. 8 (2d Cir. 1998) ("Whether U.S. copyright law directs U.S. courts to look to foreign or domestic law as to certain issues is irrelevant to national treatment, so long as the scope of protection would be extended equally to foreign and domestic authors.")

But see Geller 1989a, 50.

not, in any event, a complete choice of law rule.[183] The Berne Paris Act requires national treatment only for rights in protected works;[184] the Universal Copyright Convention requires the "same protection" given to works of nationals;[185] and the TRIPs Agreement requires treatment "no less favourable" than the treatment nationals receive with respect to the protection of "intellectual property."[186] Issues lying outside these formulations of the national treatment obligation, and not controlled by any other treaty provision, will be resolved instead under the national law designated by the forum's choice of law rules. For example, apart from the narrow provisions of Berne Article 14*bis*, dealing with ownership interests in cinematographic works,[187] neither the copyright treaties nor the TRIPs Agreement provide substantive rules on copyright ownership and transfer. As a consequence, questions of ownership and transfer, which frequently arise in the international exploitation of rights in creative works, are subject neither to the obligation of national treatment, nor to any mandatory conflicts rule derived from it, and will be resolved under the law designated by the forum's choice of law rules.

Conflict of laws issues in copyright cases having a foreign element are typically resolved in three distinct settings: where no contract between the parties prescribes the applicable law;[188] where a contract between the parties effectively specifies the law that is to govern the contract;[189] and where a contract exists, but the law of the contract conflicts with the law that would apply in the absence of contract.[190] In any one of these settings, inquiry will usually center on one or more of three sets of questions: What law or laws control determination of a work's authorship and of the rights that attach to the work?[191] What law controls the validity and interpretation of contracts that convey copyright interests?[192] What law controls the transferability of copyright interests?[193]

The question of what law governs the transferability of copyright interests is the most volatile of all conflict of laws issues in international copyright. If *A*, a U.S. national who has authored a copyrighted work, enters into a contract conveying to *B*, a French national, the right to exploit the work in France by terms

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183. *See* Ulmer 1978, 9 ("The rule of conflict of laws contained in the principle of national treatment is admittedly not a complete rule of conflict.")
184. Berne Convention, 1971 Paris Text, Art. 5(1).
185. Universal Copyright Convention, 1971 Paris Text, Art. II(1).
186. TRIPs Agreement Art. 3(1).
187. *See* §7.5.2.1, below.
188. *See* §4.4.1, below.
189. *See* §4.4.2, below.
190. *See* §4.4.3, below.
191. *See* §§ 4.4.1.1 and 4.4.1.2, below.
192. *See* §4.4.2, below.
193. *See* §4.4.3, below.

that encompass "all media presently known or to be developed in the future," which of them—*A* or *B*—will have the right to exploit the work in France through a technology that was unknown at the time the work was created? If U.S. law controls construction of the contract, the most likely answer is that *B* has these rights in France.[194] If, however, French law controls—specifically, Article L. 131-3(1) of the Intellectual Property Code requiring that the contract specifically enumerate each form of exploitation transferred—*A* will own the rights in France.[195]

§4.4.1 Where No Contract Prescribes Applicable Law

In the absence of a dispositive contract provision or treaty rule, the law of the protecting country—the country in which the work is being exploited without the copyright owner's authority—dominates judicial choice of law respecting the protectibility of a work and the rights that attach to it. Many courts also consult the law of the protecting country on questions of authorship and initial ownership,[196] but courts in other countries have looked instead to the work's country of origin, or the country having the closest connection with the work, for the law to apply to issues of authorship and initial ownership.

The general preference for the law of the protecting country as applicable law in copyright cases reflects the historic principle that copyright is territorial.[197] To apply the law of Country *A* to an alleged infringement occurring in Country *B* would, it is widely believed, violate the principle of territoriality by exporting the law of one country to the territory of another; the fact that Country *A* is the forum country should make no difference. To the extent that the obligation of national treatment is a substantive choice of law rule, it too points to the law of the protecting country as the applicable law, at least on issues governed by the treaty that imposes the obligation.[198]

The national treatment principle also offers a historical basis for rebutting the suggestion sometimes made that a work's country of origin, and not the protecting country, should provide the law applicable to at least some aspects of a work's protection.[199] As the Berne Convention has supplanted the bilateral

194. *See* Goldstein 2005, §5.3.3.2.

195. *See* §7.6.1.1, below.

196. *See, e.g.*, Germany, "*Spielbankaffaire*," Federal Supreme Court, October 2, 1997, [1999] GRUR 152, *cited in* Silke von Lewinski, *News from Germany*, 206 R.I.D.A. 319 (2005) (law of country of protection applies to scope of protection, transferability of economic right, and questions of authorship and initial ownership).

197. *See* §4.1.2, above.

198. *See* §4.2, above.

199. *See, e.g.*, Koumantos 1988, 423–428.

treaties that applied the law of the country of origin, rather than the law of the protecting country, to questions arising from a work's exploitation,[200] national treatment, rather than material reciprocity, has become the central norm for disposing of substantive questions in international copyright. This development implies that a copyrighted work should be governed by the law of the protecting country, except in cases where the governing treaty provides otherwise, or in the unusual situation where no treaty governs.

In a world linked by digital networks, copyright infringements regularly cross national borders, and a choice of law rule that looks to the protecting country for applicable law may require the forum court to ascertain and apply a large number of national laws in a single case. Commentators have for this reason criticized the traditional choice of law approach as unwieldy.[201] Taking the United States as an example, Professor Jane Ginsburg has proposed that in cases "alleging infringements in one territory, but culminating in many others," if "it is possible to localize in the United States the point from which the communication of the infringing work (whether or not in material form) becomes available to the public (wherever that public be located), then U.S. courts should apply U.S. law to unauthorized copies, wherever communicated."[202] Further, "where the United States is the 'nerve center' for foreign distributions, the domestic acts of planning and intellectually implementing the offshore acts should suffice to justify the application of U.S. law to the full series of acts."[203]

Other commentators have proposed reducing the number of applicable laws implicated by Internet infringements to only the laws of those countries where audiences were targeted for reception; similar approaches are sometimes advocated in cases of defamation.[204]

However, no proposed choice of law rule for copyright cases should be adopted unless the traditional rule is in fact deficient. Certainly, if the law of the protecting country and the law selected by any proposed alternative rule will identically dispose of the question in issue, there is no need for the competing rule. As a practical matter, this will in fact be the result in a significant number of cases involving questions of copyright subject matter and rights because the Berne Convention establishes extensive and detailed norms for resolution of these questions and, to the extent that national laws do not conform to these norms, the prospect of World Trade Organization enforcement

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200. *See* §3.1.1, above.

201. *See, e.g.,* Graeme Austin, *Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 Colum.-VLA J.L. & Arts 1 (1999); Geller 1996; Jane Ginsburg, *Copyright Without Borders? Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15 Cardozo Arts & Ent. L.J. 153 (1997); Reindl 1998.

202. Ginsburg 1997, 600.

203. *Id.*

204. Van Eechoud 2003, at 224.

procedures can be expected to press in that direction.[205] Transnational harmony is less likely to be found, and true conflicts are more likely to arise, on questions of authorship and initial ownership, both of which are largely untouched by the Berne Convention.

Even on the topics of subject matter and rights, the Berne Convention's minimum standards leave room for variations from country to country. The Convention's definition of "works" implicitly leaves it to member countries to determine whether esoteric forms of subject matter, such as the fragrance of perfumes or formats of television show, are sufficiently analogous to literary and artistic works to be brought within copyright. The permitted exceptions from the reproduction right, to take another example, have produced various national approaches to the issue of private copying. The very fact that Berne members have not harmonized their laws in these controversial areas is some evidence of the importance of these differences to national legislatures respecting conduct within their national borders, and of the consequent need to apply the law of the protecting country in these cases. While the Berne Convention may not mandate respect for these differences under the law of the protecting country, neither does it support a rule that would override these differences on questions of subject matter and rights.

Of all the criteria against which a conflict of laws rule is to be measured, one of the more important is the predictability that promotes certainty in copyright transactions. At least on questions of subject matter and rights, the choice of law rule that applies the law of the protecting country comes closer to meeting this criterion than any other, if only for the reason that its near universality has produced the same widespread expectations among copyright owners. Equally important, no alternative choice of law rule will fare better against this criterion unless and until it becomes universal or nearly so—a prospect that is distant at best. National governments will resist the adoption of any choice of law rule that will undercut the operation of the nation's substantive law for the same reason they resist harmonization of the substantive legal rules themselves. By contrast, no choice of law rule on authorship and ownership enjoys nearly universal adherence, with the result that more room exists for diverging approaches to these issues. Transactional certainty in these cases may best be served by a rule that establishes a single root of title for copyright in a work, possibly in the work's country of origin.

§4.4.1.1 Authorship and Initial Ownership

Neither the copyright conventions nor the TRIPs Agreement contain a minimum standard or choice of law rule for establishing who is a work's author or, apart from Article 14*bis*(2) of the Berne Paris Act dealing with rights in

205. *See* §3.4.1.2, above.

cinematographic works,[206] for determining who is the work's initial owner. Case law on the issue is sparse.[207] While the facts of many cases present a question of what law should be applied to determine authorship and ownership, courts rarely address the question directly; choice of law is typically implicit in the results of these cases.

Some commentators take the position that questions of authorship and initial ownership of literary and artistic works are as a rule to be determined under the law of the protecting country just as are issues relating to subject matter and rights.[208] Under this approach, if *A*, a U.S. national, creates and first publishes a work in the United States under circumstances in which the U.S. Copyright Act's work-for-hire provisions[209] would characterize *A*'s corporate employer, *B*, as the work's author and first owner, *A* will nonetheless be considered the work's author and first owner for purposes of a copyright infringement action in France, which in the usual case recognizes only flesh-and-blood creators as a work's author.[210]

Other commentators have taken the position that authorship and initial ownership are to be determined according to the law of the work's country of origin rather than the law of the protecting country.[211] In the preceding example, where the United States was the work's country of origin, this approach would require treating corporate employer *B*, and not the creative employee *A*, as the work's author and initial copyright owner in all protecting countries.[212] The U.S. Copyright Act, which is generally silent on the question, provides in section 104A, dealing with the question of ownership of rights in foreign works for which copyright has been restored,[213] that "[a] restored work vests initially in the author or initial rightholder of the work as determined by the law of the source country of the work."[214] It is not evident,

206. *See* §7.5.2.1, below.
207. *See* Van Eechoud 2003, 123–124.
208. *See* Ulmer 1987, 36–37.
209. *See* §7.4, below.
210. *See, e.g.*, Huston v. La Cinq, Judgments of May 28, 1991, Court of Cassation, May 28, 1991, 149 R.I.D.A. 197, 198 (1991).
211. *See*, *e.g.*, Lionel S. Sobel, *Pursuing the Home Court Advantage in International Copyright Litigation*, 17 Ent. Law Rep. 3, 13–14 (September 1996); Koumantos 1988, 423–428. *See generally* Van Eechoud 2003, 122–123.
212. This in fact was the approach taken by the Paris Court of Appeals in Turner Entertainment v. Huston, Court of Appeal, Paris 4th Chamber, July 6, 1989, 143 R.I.D.A. 329 (1990). *See* §4.4.3, below.
213. *See generally* §5.6.1.3, below.
214. U.S. 1976 Copyright Act §104A(b). Section 104A(h)(8)(C) defines the "source country" of a published work as "(1) the eligible country in which the work is first published, or (ii) if the restored work is published on the same day in 2 or more eligible countries, the eligible country which has the most significant contacts with the work." Section 104A(h)(7)(A) defines a "rightholder" as the person "who, with respect to a sound recording, first fixes a sound recording with authorization."

however, whether the U.S. Congress understood this provision to confirm, or to be an exception to, the choice of law rule on authorship and initial ownership applicable in the United States.

Another alternative source of rules on questions of authorship and initial ownership is the law of the country that has the closest relationship to the author and the work. In *Itar-Tass Russian News Agency v. Russian Kurier Inc.*,[215] involving the unauthorized use in the United States of works created by Russian nationals and first published in Russia, the U.S. Court of Appeals for the Second Circuit ruled that, while U.S. law governed issues of infringement and remedies in the United States, "Russian law determines the ownership and essential nature of the copyrights alleged to have been infringed."[216] The court rested its conclusion on the "usual rule" that "the interests of the parties in property are determined by the law of the state with the 'most significant relationship' to the property and the parties"; since the works were created by Russians and first published in Russia, "Russian law is the appropriate source of law to determine issues of ownership in rights."[217] In many cases, the country with the closest relationship to the author and the work will be the country of origin.

On balance, the text of the conventions lends greater support to using the law of the country of origin or the country of closest relationship to decide questions of authorship and initial ownership than to using the law of the protecting country. To the extent that Article 5(1) of the 1971 Berne Paris Act dealing with national treatment could also be considered a choice of law provision, it selects the law of the protecting country to govern only "rights," not authorship or ownership;[218] Article 5(2) similarly centers on questions of rights to the exclusion of authorship and ownership. The Universal Copyright Convention, 1971 Paris Act, speaks of the enjoyment of "protection,"[219] and the TRIPs Agreement in Article 4 confines its national treatment obligation to the "protection of intellectual property."[220] Further, because issues of authorship under the conventions are generally separate from issues of rights,

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215. 153 F.3d 82 (2d Cir. 1998).
216. 153 F.3d at 84.
217. 153 F.3d at 90. *See also* Scania v. Diesel Technic de L'Ouest, Court of Cassation, April 7, 1998, 177 R.I.D.A. 255, 256 (1998) (upholding the application of Swedish law in determining ownership of copyright when the infringement was of diagrams allegedly owned by a Swedish company.).
218. *See* §4.2, above.
219. Universal Copyright Convention, 1971 Paris Text, Art. II.
220. TRIPs Agreement Art. 3. Support for reference to the law of the protecting country on questions of initial ownership, and possibly authorship, may arguably be found in Note 3 to Article 3, stating that for "purposes of Articles 3 and 4 . . . protection shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement."

to disconnect the choice of law for the two issues should cause no undue complications. Any dislocation that might be produced by the one exception, the Berne Convention's measurement of the standard minimum copyright term by the life of the author, is in any event reduced by the presumptive applicability of the rule of the shorter term, which pivots on the term fixed in the country of origin.[221]

Reference to the law of a work's country of origin for determination of its authorship should not offend the national treatment principle if local law applies this choice of law rule equally to nationals and nonnationals alike. Further, so long as it is limited to questions of authorship and initial ownership, this choice of law rule will not materially affect the economic calculus of national treatment.[222] While the decision to extend or withhold a particular exclusive right will affect a country's balance of copyright trade, the decision whether *A* or *B* is a work's author will not, at least if made strictly on the principle of country of origin.

As a practical matter, using the law of the country of origin or the country of closest relationship as the exclusive referent for determining authorship and initial ownership of a copyrighted work will serve interests in fluent international commerce by establishing a single root of title for worldwide exploitation of a copyrighted work—a far better aid to transactional certainty than a root of title that shifts with the laws of the protecting country in issue.[223] From the perspective of transactional certainty, country of origin is at least marginally preferable as a choice of law rule to country of closest relationship, since courts may differ from forum to forum on what country has the closest relationship to a work, while "country of origin" is a defined term with a long history in the Berne Convention.[224]

Although it is appropriate for the law of the country of origin, or of the country with the closest connection to the author and the work, to control the question of original ownership of economic rights in a work, André Kerever has argued in a challenging essay[225] that if the law of the country of origin locates moral right in anyone other than the work's true, flesh-and-blood author, the law of the protecting country should instead be applied for purposes of determining standing to assert moral right.[226] For example, if in the

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221. *See* §8.3, below.
222. *See* §4.2.1, above.
223. However, as the court noted in *Itar-Tass*, country of origin might "not always be the appropriate country for purposes of choice of law concerning ownership." Specifically "[i]n deciding that the law of the country of origin determines the ownership of copyright, we consider only initial ownership, and have no occasion to consider choice of law issues concerning assignments of rights." 153 F.3d at 91 n. 11.
224. Berne Convention, 1971 Paris Text, Art. 5(4).
225. Kerever 1993.
226. *Id.* at 118–122.

case of a work originating in the United States and infringed in France the work was created "for hire,"[227] the employer and not the actual author would, for purposes of economic rights in the work in France, be treated as the original copyright owner in France.[228] However, for purposes of asserting moral rights in the work, France, as the protecting country, would give standing only to the actual author and not to the employer.[229] Since Kerever rests his argument on the principle of national treatment,[230] it would appear that if France were the country of origin of a work created under conditions approximating those of a work for hire and the United States were the protecting country, courts in the United States would be at liberty to identify moral right with the employer as the work's statutory author.

§4.4.1.2 Subject Matter and Rights

The law of the protecting country will as a rule govern the determination whether the subject matter in suit is protected by copyright and what rights attach to the copyrighted work. For example, if a work created by a national of Country *A* and first published in Country *A* is used without permission in Country *B*, the law of Country *B*, and not the law of Country *A* or any other country, will control the determination whether the unauthorized use gives rise to copyright liability.[231] If Country *A* treats sound recordings as copyrightable subject matter and Country *B* does not, a national of Country *A* who created, fixed, and first published a sound recording in Country *A* will not be entitled to copyright relief against a person who reproduces and distributes the sound recording in Country *B*. Similarly, if Country *A* and Country *C* both treat sound recordings as copyrightable subject matter and

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227. *See* §7.4, below.
228. Kerever 1993, 116.
229. *Id*. at 118. (Moral rights "protection cannot be dissociated from the beneficiary of that protection. Hence . . . the moral rights prerogatives granted by the law of the country of protection cannot be accorded to a person other than the actual creator or those who inherit the creator's rights. They must be denied to persons deemed to be original copyright owners by virtue of an employment contract of the 'work for hire' type and to contractual assignees."). In Huston v. La Cinq, Court of Cassation, May 28, 1991, 149 R.I.D.A. 197, 198 (1991), the French Court of Cassation came to a similar result by holding that the principle that actual creators enjoy moral rights is a rule of mandatory application in France that trumps normal conflicts rules. The Court did not, however, derive this conclusion from the rule of national treatment.
230. *Id*. at 120. ("In order to grant all the moral and economic rights subject to national treatment, only one option is available, namely to determine the author seeking moral rights protection not on the basis of the law of the country of origin but on that of the law of the country of protection.").
231. *See, e.g.*, France, "Waterworld," Court of Cassation, January 30, 2007, 212 (2007) R.I.D.A. 260 (law applicable to unauthorized use of novel in American film is U.S. law, not law of country where harm was suffered, i.e., France).

grant exclusive reproduction and distribution rights to them, but Country *A* also grants a public performance right while Country *C* does not, the national of Country *A* in this example will be entitled to copyright relief in Country *C* for unauthorized acts of reproduction and distribution, but not for public performance.

Application of the rule of *lex protectionis* to questions of copyright infringement (i.e., issues concerning the scope of rights) is supported by the generally accepted conflicts rule that unlawful acts (torts) are governed by the law of the place where the tort was committed (*lex loci delicti*). For most practical purposes, the place of the tort and the place where protection is sought will coincide. In Europe, E.C. Regulation No 864/2007 on the law applicable to non-contractual obligations expressly provides: "The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed."[232] According to one of the Regulation's recitals, this provision reflects "the universally acknowledged principle of the *lex loci protectionis*." Derogation by contract from this rule is forbidden.[233]

Considerations of necessity and propriety compel application of the protecting country's law in cases involving subject matter and rights in a way that they do not in cases involving authorship and initial ownership. Unlike authorship and initial ownership, which are mostly untouched by the copyright treaties, subject matter and rights are subject to the harmonizing influence of extensive and detailed treaty norms and consequently present a comparatively limited range for conflicts of laws. Also, within the limits permitted by treaty norms, respect for national economic decisions supports application of the law of the protecting country to questions of subject matter and rights. Unlike questions of authorship and initial ownership, which as a practical matter will have only limited impact, if any, on a country's balance of trade, national rules on subject matter and rights inescapably do. For example, the decision in many countries to bring sound recordings under neighboring rights rather than copyright[234] reflects an economic perception, no less than a cultural one, that, as net importers of recorded music, they will fare better keeping these works outside of copyright. Similarly the decision in some European countries to keep public lending rights outside of copyright[235] reflects a predominantly economic judgment on copyright balance of trade.

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232. E.C. Regulation No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations Official Journal of the European Union L 199/40 of July 31, 2007 ("Rome II Regulation") Art. 8(1). Recital 26 clarifies that this provision concerns infringements of, inter alia, copyrights, related (i.e., neighboring) rights, and *sui generis* database rights.
233. E.C. Rome II Regulation Art. 8(3).
234. *See* §6.2.2, below.
235. *See* §9.1.2.3, below.

Another reason for applying the law of the protecting country to questions of subject matter and rights, even in cases of multinational infringement, is that in those areas where the governing treaty norms permit legal experimentation and variety at the national level, the differences permitted are uniquely connected to the cultural and political conditions of the country under whose law protection is sought. The fact, for example, that the United States has a particularly robust and open-ended fair use defense[236] reflects national concerns about the conditions of free speech and press that should obtain within the country's borders; to impose another country's more limited fair dealing defense to an infringement action arising in the United States might well defeat those interests.

The persistence of the law of the protecting country as the preferred law to govern questions of subject matter and rights will, to be sure, inevitably complicate multijurisdictional enforcement of copyrights over digital networks. One solution, with complications of its own, would be to identify the applicable law in these situations with a single source country, producing a regime of what Professor Ginsburg has aptly called a "kind of one-stop worldwide rights clearing."[237] Under the E.C. Satellite Directive, for example, the law of the country from which a signal is uplinked to a satellite, and not the laws of the countries in which the signal is received, controls the question of infringement throughout the European Union.[238] The Satellite Directive is, however, a substantive legal regime agreed upon by E.U. countries and is not a conflict of laws rule; the Directive follows the standard precept that the law of the protecting country controls the question of infringement and makes its contribution by locating the single country in which the infringement occurs. The fact that the Satellite Directive is a rule of substantive law, not procedural law, only underlines the fact that it will be no easier as a political matter to obtain universal agreement on a new choice of law rule for multijurisdictional infringement than it will be to obtain universal agreement on a substantive norm governing the question of rights or subject matter in issue.

§4.4.2 Law of the Contract as Applicable Law

Choice of law rules governing international copyright contracts aim to reduce transactional uncertainty over the terms on which a work can be exploited by tying the contract's interpretation and enforcement to the law of a single jurisdiction. Further, contracting parties can often rely on the expectation

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236. *See* Chapter 11, below.

237. Jane Ginsburg, *The Cyberian Captivity of Copyright: Territoriality and Authors' Rights in a Networked World*, 15 Santa Clara Computer and High Tech. L.J. 347, 358 (1999).

238. *See* §4 above and §9.1.4.3, below.

that the forum in which their contract is litigated will select the applicable law according to one of the major, and closely comparable, approaches taken to contract choice of law around the world.[239] The E.C. Convention on the Law Applicable to Contractual Obligations,[240] commonly known as the Rome I Convention, which was replaced in 2008 by the directly binding Rome I Regulation,[241] is one important force in harmonizing contract choice of law methodologies; the American Law Institute's Restatement of the Law, Conflict of Laws, Second[242] is another. Also, contracting parties can most effectively increase their level of transactional certainty by using the contract itself to designate the country whose law is to govern the contract.[243]

The certainty and uniformity offered by international choice of law rules for copyright contracts is not absolute. Although the approaches taken in the Rome I Regulation and the Restatement of Conflicts, Second overlap, they also diverge on important points. Further, the copyright law of the protecting country will sometimes supersede private contract terms. This most commonly occurs when the copyright law of the protecting country characterizes as inalienable a right that the parties have by contract purported to transfer.[244] Even a contract's fully negotiated and seemingly ironclad governing law clause will not be foolproof, since public policy in the forum may require the forum to substitute its choice of law for the parties' choice.[245]

At the threshold of any case involving a copyright contract with international elements is the question of what law the forum should apply in determining whether the contract itself is valid. Not only a contract's granting clauses, but also its governing law clause, will be unenforceable if the contract does not comply with the applicable statute of frauds or was entered into by a party lacking contractual capacity. Under the Rome I Regulation, the validity of a contract, or any term in it, will as a rule be determined by the same law as

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239. *See* §4.4.2.2, below.
240. O.J. No. L 266/1 (1980).
241. E.C. Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal of the European Union L 177/6 of July 4, 2008.
242. American Law Institute, Restatement of the Law, Conflicts of Law, Second (1971). Although the Restatement of Conflicts, Second is directly concerned with legal relations among the states of the United States of America, its principles are intended to apply in international settings as well. Section 10 of the Restatement provides: "The rules in the Restatement of this Subject apply to cases with elements in one or more States of the United States and are generally applicable to cases with elements in one or more foreign nations. There may, however, be factors in a particular international case which call for a result different from that which would be reached in an interstate case."
243. *See* §4.4.2.1, below.
244. *See* §4.4.3, below.
245. *See* §4.4.3, below.

would govern the contract if the contract or term were valid.[246] Nonetheless, a party may in appropriate circumstances rely on the law of the country of his habitual residence to establish his lack of consent.[247] Further, a contract is formally valid if it satisfies the formal requirements of the law applicable to it under the Regulation or the law of the country, or one of the countries, in which it was concluded.[248]

Under Article 12 of the Rome I Regulation, the law applicable to a contract, by reason either of party choice of law or judicial choice, will govern questions of interpretation, performance, consequences of breach (including assessment of damages), prescription and limitations of actions and extinction of obligation, and consequences of contract nullity.[249] The Rome I regime will not govern the chiefly proprietary aspects of a copyright contract, which are normally governed by the *lex protectionis*. This may lead to complicated situations in cases where national rules aimed at restricting the scope of copyright transfers are framed as limits on assignability (i.e., as essentially proprietary rules). Arguably, such complexities can be avoided by applying the law of the contract by analogy.[250]

The Conflicts Restatement makes the law chosen, as a matter of contract by the parties or as a matter of law by the court, govern issues of illegality, misrepresentation, duress, undue influence and mistake,[251] construction,[252]

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246. E.C. Rome I Regulation, Art. 10(1).
247. E.C. Rome I Regulation, Art. 10(2).
    Under the Conflicts Restatement, capacity is to be determined under the law otherwise applicable under the Restatement, with the qualification that the "capacity of a party to contract will usually be upheld if he has such capacity under the local law of the state of his domicile." Restatement of Conflicts, Second §198.
    Cf. Bodley Head Ltd. v. Flegon, [1972] R.P.C. 587 (power of attorney executed in Russia in 1970 by Russian author Alexander Solzhenitsyn, authorizing Swiss lawyer to act as author's literary agent outside Russia, sufficed as root of title for copyright in Berne Union of novel first published in France, notwithstanding claim that author lacked contract capacity, and power of attorney was invalid, under Russian law; agency was delivered to lawyer in Switzerland by an intermediary, and was governed by Swiss law, consequently conveying necessary contractual capacity to agent.) *See also* Hermann Luchterhand Verlag GmbH v. Albert Langer-Georg Müller Verlag GmBH, German Federal Supreme Court, April 16, 1975, (Case No. I ZR 40/73) 7 I.I.C. 134 (1976).
248. Rome I Regulation Art. 11(1),(2).
    Under the Conflicts Restatement, the formalities essential to a valid contract are determined by the law otherwise applicable under the Restatement; "[f]ormalities which meet the requirements of the place where the parties execute the contract will usually be acceptable." Restatement of Conflicts, Second §199.
249. Rome I Regulation Art. 12(1)(1).
250. Van Eechoud 2003, 202–205. *See also* Rome I Regulation Art. 14.
251. Restatement of Conflicts, Second §§201, 202. Section 202(2) adds, "When performance is illegal in the place of performance, the contract will usually be denied enforcement."
252. Restatement of Conflicts, Second §204.

nature and extent of obligations,[253] and measure of recovery;[254] "[i]ssues relating to details of performance of a contract are determined by the local law of the place of performance."[255]

§4.4.2.1 When Parties Have Designated Applicable Law

Contracting parties are usually free to choose the law that will govern their contract. In the European Union, the Rome I Regulation provides that parties can select the law applicable to all or part of their contract; the choice may be express or implied so long as it is "clearly demonstrated by the terms of the contract or the circumstances of the case."[256] One example of choice by implication is where the parties, in their prior dealings, regularly stipulated the governing law but failed to do so in the contract in dispute; the court could in this situation select the law regularly chosen by the parties if the circumstances indicate no intention to depart from it. If the contract specifies a particular forum or place for arbitration, the court could choose the law of that place if it is reasonable in the circumstances.[257]

In the United States, the Restatement of Conflicts, Second provides that "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue."[258] As under the Rome I Regulation, the choice may be implied as well as express and partial as well as complete.[259] Japanese law also allows contracting parties expressly or impliedly to designate the law that will govern their copyright contracts.[260]

Both the Rome I Regulation and the Restatement of Conflicts, Second impose limitations on party autonomy in selecting applicable law by leaving room under circumscribed conditions for the direct judicial application of mandatory rules. Article 3(3) of the Rome I Regulation effectively provides that if a contract's relevant elements are rooted in some country other than the country designated in the choice of law clause, the rules of that country "which cannot be derogated from by agreement" will supersede the law

253. Restatement of Conflicts, Second §205.
254. Restatement of Conflicts, Second §207.
255. Restatement of Conflicts, Second §206.
256. Rome I Regulation Art. 3(1). According to Giuliano & Lagarde 1982, 369, the rule restates the law then existing in E.C. Member States.
257. Giuliano & Lagarde 1982, 371.
258. Restatement of Conflicts, Second §187.
259. Restatement of Conflicts, Second, Comment a to §187 (1988 Revision); Restatement of Conflicts, Second, Comment i to §187 (1988 Revision).
260. Law No. 10 of June 21, 1898, as amended by Law No. 7 of 1942, Law No. 223 of 1947, Law No. 100 of 1964, and Law No. 27 of 1989 Art. 7(1), *translated in* Kitagawa 1995. *See generally* Untiedt 1984, 193.

selected by the parties. Antitrust laws are a common example of such rules;[261] another example are the mandatory user freedoms warranted by the E.C. Software and Database Directives.[262] Elsewhere, the Rome I Regulation gives special status to so-called "overriding mandatory provisions." This term describes rules of law which are intended not only to override party autonomy but are also capable of taking effect irrespective of the operation of private international law[263] (in French: "*lois de police*"). According to Article 9(2), "Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum." Under Article 9(3), a court may, when applying the contractually designated law of one country, give effect "to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful."[264] However, Article 21 provides that application of the law of any country specified by the Regulation—whether chosen by the parties, by the court, or dictated as a mandatory rule—"may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum."[265]

The Restatement of Conflicts, Second requires respect for party choice of law unless either of two conditions is met: the state whose law is chosen "has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice"; or applying the chosen law would contradict "a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue" and whose law would govern in the absence of the governing law clause.[266] Japanese law similarly provides that otherwise applicable law will not control if it is contrary to the "public order and good morals" of Japan.[267]

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261. *See generally* Friedrich-Karl Beier, *Conflict of Law Problems of Trademark License Agreements*, 13 I.I.C. 162, 167–69 (1982); Paul Torremans, *Choice-of-Law Problems in International Industrial Property Licenses*, 25 I.I.C. 390, 393–94 (1994).
262. E.C. Software Directive, Art. 8; E.C. Database Directive, Art. 15.
263. Wadlow 1998, 455.
264. Rome I Regulation, Art. 9(3) adds: "In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application." *See generally* Allan Philip, *Mandatory Rules, Public Law (Political Rules) and Choice of Law in the E.E.C. Convention on the Law Applicable to Contractual Obligations*, *in* Contract Conflicts: The E.E.C. Convention on the Law Applicable to Contractual Obligations: A Comparative Study 81 (P.M. North ed., 1982).
265. *See generally* Wadlow 1998, 463–470; Giuliano & Lagarde 1982, 392.
266. Restatement, Conflicts Second §187 (1988 revision.).
267. Law No. 10 of June 21, 1898 Art. 33, *translated in* Kitagawa 1995. *See generally* Untiedt 1984.

§4.4.2.2 When Parties Have Not Designated Applicable Law

Where for one or another reason the parties to an international copyright agreement fail to include a governing law clause in the contract, courts will apply one or more factors of varying degrees of precision to determine what country's law to apply to the agreement. Where the omission was an evident oversight, courts will, if the facts allow, imply the presumably intended choice of law into the agreement.[268] Where, however, the omission was intentional, courts will commonly weigh generalized interests in contract certainty against particularized party interests of efficiency and equity. Although judicial choice of law in these circumstances will be constrained by most of the same public policy limitations as constrain party choice of law,[269] public policy considerations will as a practical matter frequently influence the choice of law itself.

In the absence of choice of law by the parties, the law applicable to a contract will under Article 4 of the Rome I Regulation depend, in first instance, on the characterization of the contract. For contracts relating to sales of goods, provisions of services, franchise contracts, and distribution contracts, the Regulation points to the law of the country where the seller, service provider, franchisee, or distributor respectively have their habitual residence.[270] Intellectual property transfers, however, are not mentioned as a specific category.[271] In other cases, "the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence."[272] The Regulation has severely reduced the scope of what under the Rome I Convention used to be the default rule—the law of the country with which the contract "is most closely connected." This conflicts rule now applies only "where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated" by Article 4(1) and (2), or where the law simply cannot be determined under these two rules.[273]

Where does this leave copyright contracts? In situations where a copyright transfer is an integral part of any of the contract types mentioned in Article 4(1), the transfer will most likely be governed by the corresponding rule.

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268. *See* §4.4.2.1, above.
269. *See* §4.4.2.1, above.
270. E.C. Rome I Regulation, Art. 4(1)(a), (b), (e) and (f).
271. Art. 4(1)(f) of the original proposal would have provided for such a special rule: "a contract relating to intellectual or industrial property rights shall be governed by the law of the country in which the person who transfers or assigns the rights has his habitual residence"; see European Commission, Proposal for a Regulation on the Law Applicable to Contractual Obligations ("Rome I") of December 15, 2005, COM(2005) 650 final.
272. E.C. Rome I Regulation, Art. 4 (2).
273. E.C. Rome I Regulation, Art. 4(3) and (4).

In other cases, the analysis will require identification of "the party required to effect the characteristic performance."

In the case of a relatively simple contract transferring a copyright interest in return for payment of a lump sum or an ongoing obligation to pay royalties, it is the act of transferring the copyright interest that constitutes the contract's characteristic performance, so that the applicable law is the law of the country where the copyright owner resides or has its central business offices.[274] For example, if an author who habitually resides in Italy assigns his copyright to a licensing agent situated in Germany, Italian law will govern the contract in any action in a forum subject to the Rome I Regulation.

Determination of the "characteristic performance" is less straightforward in the more complex international copyright arrangement where the licensee undertakes not only to pay royalties but also affirmatively to exploit the copyrighted work. According to some commentators, the contract's characteristic performance will in such cases usually be identified with the licensee.[275] For example, if an Italian resident assigns the exclusive right to publish his novel in Austria to a publisher having its central business establishment in Germany, German law would control the contract. The rationale for this conclusion is evidently that since the licensee is investing its labor and capital in exploiting the copyright, and since the contract's economic success, for the author as well as the publisher, will depend on this investment, it is the investment rather than the assignment that constitutes the characteristic performance. Other commentators are more cautious.[276] According to Dr. Van Eechoud, "the fact that such an obligation [to exploit] exists does not necessarily mean that the publisher effectuates the characteristic performance; that rather depends on the obligations resting with the owner of the intellectual property (licensor)."[277]

A determination of the publisher or intermediary as the party required to effect the contract's "characteristic performance" does not necessarily mean that the law of the licensee's habitual residence or seat of business will control in any case. Rome I Regulation Article 4(3) allows the courts to disregard this result if the contract is manifestly more closely connected with another country. In the case of at least some complex copyright contracts, the country with the closest connection will be the country where the work is actually exploited—for copyright purposes, the protecting country. As a

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274. *See* Wadlow 1998, 431. *See also* Giuliano & Lagarde 1982, 374 (characteristic performance is not the remittance of money but "the granting of the right to make use of an item of property.").

275. *See* Wadlow 1998, 432; Ulmer 1978, 94, §147; Walter 1976, 62–64. *See also* Giovanna Modiano, *International Patent Licensing Agreements and Conflict of Laws*, 2 NW. J. Int'l L. & Bus. 11, 26 (1980).

276. Van Eechoud 2003, 198–202.

277. Van Eechoud 2003, 200.

factual matter, the protecting country will also in many cases be the licensee's habitual residence or seat of business.

The disadvantage of relying on the licensor's residence or headquarters in some cases and the licensee's in others is that it will not always be clear which choice a court will make. The virtue of applying the law of the licensor's or licensee's residence or headquarters is that, once the choice is made, a uniform set of contract rules will apply wherever the work is exploited and in whatever forum the contract is litigated. At the same time, the virtue of uniformity in these cases should not be overstated, since it is a virtue that the parties, through oversight or premeditation, forfeited when they failed to include a governing law clause in their agreement. This fact, together with considerations of judicial economy and predictability of outcome, may well argue for applying the law of the protecting country in these circumstances.

Contract choice of law in the United States under the Restatement of Conflicts, Second is more open ended than contract choice of law under the Rome I Regulation. Section 188(1) of the Conflicts Restatement treats the law of the state that has "the most significant relationship to the transaction and the parties" as the law of the contract.[278] In determining what state possesses this "most significant relationship," a court is to evaluate at least five contacts "according to their relative importance with respect to the particular issue": "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties."[279]

As a rule under the Restatement, if the state in which the contract is negotiated and the state in which it is performed are the same, that state's law will usually control.[280] For example, if a novelist residing in Italy negotiated in Austria with a German-based publisher for the publication of a translation in Austria, Austrian law would, in the absence of a governing law clause, probably

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278. Restatement of Conflicts, Second §188(1) refers to "the principles stated in §6" as governing this determination. Section 6 provides:

    (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

    (a) the needs of the interstate and international systems,

    (b) the relevant policies of the forum,

    (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

    (d) the protection of justified expectations,

    (e) the basic policies underlying the particular field of law,

    (f) certainty, predictability and uniformity of result, and

    (g) ease in the determination and application of the law to be applied.

279. Restatement of Conflicts, Second §188(2).

280. Restatement of Conflicts, Second §188(3).

govern the publication contract under the principles of the Restatement. This result contrasts with the result that would obtain under Article 4(2) of the Rome I Regulation, which would have Italian law (as the law of the licensor's residence) or German law (the publisher's seat of business), but not Austrian law, control.

Application of the five Restatement factors to an international copyright contract calling for something more than a lump sum payment by the licensee will in many if not most cases lead to choice of the protecting country's law to govern the contract. According to comments to the Restatement, the place of contracting is a "relatively insignificant contact."[281] Place of negotiation, though significant in some cases, is less important where negotiations are not conducted face to face[282]—a frequent phenomenon in international copyright contracts. The location of the contract subject matter is irrelevant to copyright, which, as an intangible right, has no situs; and location of the parties, while particularly material to personal issues such as capacity, will generally be important only in combination with other contacts.[283] Place of performance, the remaining factor, is also the most salient of the five factors for copyright contracts. Of the two possible facts that can reduce its importance—that the place of performance is unknown at the time of contracting or consists of more than one state[284]—the first is irrelevant to copyright contracts, where the location of performance will invariably be known, and the second will be material only in multijurisdictional licenses. Further, under section 206 of the Restatement, "[i]ssues relating to details of performance of a contract are determined by the local law of the place of performance."

§4.4.3 Where the Law of the Protecting Country and the Law of the Contract Conflict

Conflicts will sometimes arise between the law governing a contract for exploitation of a copyrighted work and the law of the protecting country that would apply in the absence of a contract. Contract law in Country *A* may permit copyrights to be freely transferred, while copyright law in Country *B* characterizes a particular right in the copyright bundle of rights as inalienable. If the contract designates Country *A*'s contract law to govern the terms of the contract, and a dispute arises over the licensee's exploitation of the right in Country *B*, a conflict will exist between Country *A*'s contract rule of free alienability and Country *B*'s copyright rule of inalienability. Because it

281. Restatement of Conflicts, Second, Comment on §188(2).
282. Restatement of Conflicts, Second, Comment on §188(2).
283. Restatement of Conflicts, Second, Comment on §188(2).
284. Restatement of Conflicts, Second, Comment on §188(2).

pits interests in contractual freedom and fluent commerce against entrenched cultural convictions and authorial autonomy, the conflict is one of the most vexed in the private international law of copyright. These conflicts are analytically distinct from, but often overlap, the conflict that arises in private international law generally when the law of the contract conflicts with the public policy of the forum in which the dispute is being heard.[285]

Conflicts between contract law and copyright law typically involve questions over the assignment of rights, and the prevailing approach to these conflicts usually makes copyright rules prevail over contract rules. Professor Ulmer captured the prevailing approach in his observation that "[t]he questions involved are those which—like the question of assignability—concern the legal nature of the right as imprinted by the law of the protecting country."[286] In Michael Walter's phrase, "the transferability of the copyright is part of its content, which is supposed to be governed according to local law."[287] Moral right, usually inalienable under local law,[288] is an example of a right "imprinted by the law of the protecting country." The prevailing approach to copyright-contract conflicts, when taken together with the treaty requirement of national treatment, ensures that foreign copyright owners, no less than domestic copyright owners, will enjoy the benefits of the copyright rule over any conflicting contract provisions. "If copyright claimants are to enjoy full national rights in a country, they should have all national rules applied in their favor which these rights, by nature or definition, necessitate applying."[289]

Nevertheless, even in Continental Europe, national rules on copyright ownership and transfer are generally not considered to be immune to conflicting rules resulting from the operation of the law of the contract, unless such copyright rules are regarded as "overriding mandatory provisions."[290] A rare example comes from Germany, where the author's general, unwaivable right to equitable remuneration is immunized by statute against conflicting choices of law. According to Article 32a of the German Act, as introduced in 2002, the right to equitable remuneration has mandatory application if, but for a contractual choice of law, the copyright license would be governed

285. In most copyright contract cases, the forum country and the protecting country will be the same, and the specific restrictions imposed by the country's copyright law may also reflect the forum's public policy. Cases may arise, however, in which Country *A* provides the law of the contract, Country *B*, as the protecting country, provides the relevant copyright rules, and Country *C*, the forum in which the action is brought, must weigh not only the conflict between the law of Countries *A* and *B*, but also its own public policies.

286. Ulmer 1978, 46.

287. Walter 1976, 70.

288. *See* §10.5, below.

289. Geller 1989a, 54.

290. E.C. Rome I Regulation, Art. 9 (1).

by German law or if the contract concerns substantial uses of the work on German territory. The net result is that authors (and performers) may always invoke the right to remuneration whenever their works are used in Germany.[291]

Campbell Connelly & Co. Ltd. v. Noble[292] is the leading English case on the methodology for sorting out contract rules from rules essential to the definition of rights under the law of the protecting country. The contract in issue, by which defendant composer assigned to plaintiff publisher "'the full copyright for all countries'" in his musical composition, was, the court stated, "a purely English contract and must plainly be interpreted according to English law."[293] The harder question for the court was whether this language was effective to convey the U.S. renewal rights to the composition.

To answer the question, the court in *Campbell Connelly* first referred to U.S. law for characterization of the "precise nature" of the right in issue and to determine whether, and under what circumstances, the renewal right could be assigned under U.S. law. Concluding that the renewal right was assignable in the circumstances,[294] the court next looked to English law to determine whether the "purely English contract" did in fact assign the American renewal rights. The court held that, under English rules of construction, the contract did convey the renewal right.[295]

A French case, *Huston v. La Cinq*,[296] provides a somewhat less explicit instance of the resolution of copyright-contract conflicts. Was authorship of the black-and-white film *Asphalt Jungle*, and the contract by which writer-director John Huston assigned his worldwide rights in the film to defendant's predecessor, to be construed according to U.S. law, so that defendant's licensor, Turner, owned the rights and was free to colorize the film? Or did the legal definition of "author" in France and the inalienability of moral right

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291. *See* Dietz 2003, 190.
292. 1 W.L.R. 252 (1963).
293. 1 W.L.R. at 254 (1963).
294. 1 W.L.R. at 257–58 (1963).
295. 1 W.L.R. at 261–62 (1963). *Compare* Corcovado Music Corp. v. Hollis Music, Inc. 981 F.2d 679, 685 (2d Cir. 1993), where the court rejected the argument that a contract between a Brazilian composer and a Brazilian publisher should be interpreted according to Brazilian law, which had been designated by the contract's governing law clause. The court distinguished *Campbell Connelly* on its facts and, more important, concluded that the English decision "could not be applied here to preclude the use of United States law. Factors arguing for the application of United States law include the following: United States renewal copyrights reflect a vital policy of United States copyright law; the forum in which the . . . contracts are to be construed is in the United States . . . and the place of performance of the contracts is also the United States. Under these circumstances, we believe that United States law is applicable."
296. Consorts Huston et. autres v. Sté Turner Entertainment, Court of Cassation 1st Civ. Chamber, May 28, 1991, 149 R.I.D.A. 197 (1991).

under French law make American law irrelevant to the dispute in French courts, giving Huston's heirs and his co-writer, Ben Maddow, standing to sue for violation of their right to the work's integrity?

The Paris Court of Appeal ruled for defendant, holding that authorship and ownership were to be determined under the law of the United States as the work's country of origin, a choice of law decision that "compels denying the parties Huston and Maddow any possibility of asserting their moral rights."[297] In a terse opinion, the Court of Cassation set aside the court of appeals decision, attaching no weight to the possible applicability of U.S. law and focusing instead on the essential nature of moral right and authorship under French law.[298]

The Court of Cassation relied on Article 6 of the French Copyright Act, the Law of March 11, 1957, which makes moral rights inalienable.[299] As Professors Ginsburg and Sirinelli have observed, the court held that "French law directly governs all questions of authors' rights of integrity and attribution, without inquiry into the legislative competence of foreign laws that had significant points of attachment to the litigation. The Court has thus stressed the international applicability of the French concepts of authorship and of these moral rights, whatever the country of the work's origin, the nationality or domicile of the work's creators, or the law governing the contract between creators and grantees."[300] Evidently, the Court of Cassation considered the forum's rules on moral rights "overriding mandatory provisions," which under the Rome I regime may on rare occasion set aside the law that would otherwise have been applicable.[301]

As a third example, under the approach elaborated in the *Campbell Connelly* and *Huston* cases, an author who assigns the worldwide copyright in his work for the full term of copyright would nonetheless, under the U.S. Copyright Act's termination of transfer provisions,[302] be entitled to terminate his transfer of rights to the U.S. territory 35 years after the contract's execution. Since the 1976 Copyright Act makes the statutory right to terminate

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297. Turner Entertainment v. Huston, Court of Appeal, Paris 4th Chamber, July 6, 1989, 143 R.I.D.A. 329, 335 (1990) ("*et par conséquent* conduisaint à dénier aux consorts Huston-Maddow toute possibilité de se preévaloir d'un droit moral . . .") (emphasis the court's).

298. 149 R.I.D.A. at 198 (1991) Since, as one commentator observed, France grants foreign authors moral rights under its domestic law, "the Huston heirs did not need the Berne Convention, or any other treaty, to support their proposed choice of France law to govern their suit." Paul Edward Geller, *French High Court Remands Huston Colorization Case*, 13 Ent. L. Rep. 3, 4 (August 1991).

299. 149 R.I.D.A. at 197–198.

300. Ginsburg & Sirinelli 1991, 137. *See also* Bernard Edelman, *Applicable Legislation Regarding Exploitation of Colourized U.S. Films in France: The "John Huston" Case*, 23 I.I.C. 629, 641 (1992).

301. E.C. Rome I Regulation, Art. 9(1) and (2). See §4.4.2.1, above.

302. U.S. 1976 Copyright Act §203. *See generally* §7.6.1.2, below.

transfers inalienable and nonwaivable, and thus an intrinsic part of the exploitation right under U.S. law,[303] contract language that purported to override the statutory termination of transfer would be of no effect, regardless of the law governing the contract. The contract's conveyance of the full copyright term would, however, be fully enforceable under the law of any other protecting country, except those that may otherwise restrict alienability of the right in issue.

As in the *Campbell Connelly* and *Huston* cases, copyright contract terms most commonly come into conflict with rights "imprinted by the law of the protecting country." However, Professor Ulmer identified as another matter reserved to the law of the protecting country "whether, and under what conditions, an assignment or grant is effective as against a third party who claims rights by reason of a subsequent assignment or grant from the author of the work or his successor in interest."[304]

Local recording systems, where they exist, effectively establish priorities between competing transfers of the same copyright interest, giving interest holders from around the world a single place in each country in which to search title, register, and establish their rights with respect to that country. Even where recording systems do not exist, local statutory rules may establish priorities. At least two considerations explain the primacy that these systems and rules under the law of the protecting country receive over conflicting contract terms. One is deference to local judgments on the efficient operation of a title priority system. Second, in the absence of universal treaty arrangements governing priorities, a rule that the law of the protecting country governs priorities in that country will provide interest holders and potential interest holders with the certainty they need in concluding copyright transactions. The alternative—allowing a private contract or the law of another country to determine whether one or another claimant from the same source holds title in the protecting country—would entirely destabilize copyright titles.

303. *See* Geller 1989a, 55.
304. Ulmer 1978, 47.

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CHAPTER
5

Scope and Points of Attachment of International Protection

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As a rule, a country's obligation to protect foreign works—a work by a foreign national, for example, or a work first published in another country—will turn on the terms of its copyright relations with the country in which the work originated. Only rarely, and selectively, will a country extend copyright or neighboring rights protection to a foreign work in the absence of some general or reciprocal treaty relationship with the work's country of origin. One example is the unconditional and universal extension, as in France and Germany, of protection for at least some of an author's moral rights.[1] Another is the U.S. Copyright Act's protection of unpublished works without regard to the author's nationality.[2]

The first step in determining whether, and to what extent, a work will be protected in a particular country is to determine the requirements that the country's legislation imposes as a condition to protection and, if the governing treaty is self-executing, to determine the requirements imposed by the treaty. If the work in question was created or published before the effective date of the applicable legislation or treaty, it will often be necessary to inquire as well into the requirements for protection imposed by statute or treaty at the earlier time.[3]

§5.1 Berne Convention

The 1971 Paris Text of the Berne Convention for the Protection of Literary and Artistic Works is today the principal vehicle for copyright and author's right protection of works abroad. Nonetheless, the bilateral and regional treaties that defined a country's early copyright relations have more than historical significance, as does the Universal Copyright Convention, the only truly multilateral convention to which the United States adhered before Berne. The current status abroad of the many U.S. works that were published before March 1, 1989, can often be resolved only through a careful archeological dig that moves backward in time from the present, through the earlier layers of treaty relations formed by the U.C.C., by the bilateral treaties, and sometimes by earlier texts of the Berne Convention.[4]

The Berne Convention for the Protection of Literary and Artistic Works exists in several texts, starting with the 1886 Berne Act, followed by successive revisions in 1908 (Berlin), 1928 (Rome), 1948 (Brussels), and, most recently,

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1. *See* France, Intellectual Property Code Art. L 111-4 (rights of attribution and integrity); Germany, Copyright Act Art. 121(6) (rights of attribution, integrity, and disclosure).
2. U.S. 1976 Copyright Act §104(a). *See* §5.6.1.1, below.
3. On the methodology to be employed in these cases, see §3.1.5, above.
4. On the interrelationship between protection under the Berne and Universal Copyright Conventions and the bilateral treaties, see §3.1.5, above.

1971 (Paris), the first Berne text to which the United States adhered.[5] As a rule, each successive revision of the Berne treaty has increased the Convention's minimum standards for protection, requiring stronger rights, reduced formalities, or a more commodious definition of protected subject matter. Because not all Berne Union countries have adhered to the 1971 Paris Text or even to the 1948 Brussels Text, a question will sometimes arise as to the extent of protection that a work coming from the United States, which has adhered only to the Paris Text, will enjoy in these countries.[6] Since, however, the TRIPs Agreement imposes the Paris Text's minimum standards on all World Trade Organization members, these asymmetries in protection will disappear over time as WTO membership increasingly coincides with membership in the Berne Union.[7]

Once a copyright owner determines which Berne act applies to its work in the country where it seeks protection, it must next determine whether the work comes within the scope of that act[8] and, if it does, whether the work possesses a point of attachment prescribed by the act.[9] The question whether a work falls within the scope of the applicable Berne act divides into two more specific questions: whether the work comes within a class of subject matter for which the act prescribes protection,[10] and whether the applicable term of protection has lapsed.[11] The question whether the work has a qualifying point of attachment will in most cases be controlled by the nationality of the work's author or the place of the work's first publication.[12]

§5.1.1 Application of the Berne Convention

§5.1.1.1 Subject Matter Scope

The Paris Text of the Berne Convention states in Article 1 that "[t]he countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works." Article 2(1) defines "literary and artistic works" to include "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its

5. The 1967 Stockholm Revision Conference produced a Stockholm Act, which was ratified in part by 39 countries. The 1971 Paris Revision Conference, convened to correct problems in the Stockholm Act, produced the 1971 Paris Text. *See* §3.1.2.1, above. *See generally* Ricketson 1987, 124–125.
6. *See* §3.1.5, above.
7. *See* §5.4, below.
8. *See* §5.1.1, below.
9. *See* §5.1.2, below.
10. *See* §5.1.1.1, below.
11. *See* §5.1.1.2, below.
12. *See* §5.1.2.1 and §5.1.2.2, below.

expression,"[13] and concludes with a lengthy list of examples, from "books" to "three-dimensional works relative to geography, topography, architecture or science."[14] Article 2(2) leaves it to Union members to decide for themselves whether "works in general or any specified categories of works shall not be protected unless they have been fixed in some material form."[15] Article 2(8) declares categorically that "[t]he protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information."

Article 2's scope, though broad, is not exhaustive, and U.S. authors accustomed to the 1976 U.S. Copyright Act's generous construction of the term "writings of authors"[16] will find not only that many countries define the protectible classes of subject matter more sparingly, but also that the Berne Convention fully sanctions their parsimony. Sound recordings, for example, though expressly protected as copyrightable works under the 1976 U.S. Copyright Act,[17] appear nowhere in Article 2(1)'s listing of examples, a fact that is mirrored in much of the world by the practice of protecting sound recordings under neighboring rights rather than author's right or copyright.[18] Conversely, authors from civil law countries seeking protection in the United States will perhaps be surprised to discover that works not "fixed in any tangible medium of expression" are not protected under the U.S. Copyright Act,[19] and that Berne Article 2(2) permits such an exclusion.

§5.1.1.2 Temporal Scope

In time, all U.S. works for which protection is sought abroad will have been created after March 1, 1989, when the United States adhered to the Berne Convention, and little complexity will attend the question of a work's entitlement to, or term of, protection. At least in the near term, however, many of the U.S. works for which foreign protection is sought will have been created before March 1, 1989. Some of these preadherence works have been protected in Berne Union countries from the start because their copyright owner took care to arrange for their first or simultaneous publication in a Berne country, entitling the work to Berne protection through the so-called back door to Berne.[20] Works created before March 1, 1989, that did not enter

13. For a more detailed analysis of Berne Convention subject matter, see §6.1, below.
14. Article 2(3) of the Berne 1971 Paris Text provides that "[t]ranslations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work."
15. *See* §6.1.5, below.
16. *See* §6.1.2.1, below.
17. *See* §6.2.2, below.
18. *See* §6.2.2, below.
19. U.S. 1976 Copyright Act §102(a). *See* §6.1.5, below.
20. *See* §5.1.2.2, below.

through the Berne back door may nonetheless enjoy Berne-level protection today through either of two avenues: (1) prior coverage in the protecting country under some earlier treaty relationship with the United States, or (2) retroactive protection under Article 18 of the 1971 Berne Paris Text.

(A) Prior Treaty Coverage

Before the United States adhered to the Berne Convention, it was a party to the Universal Copyright Convention and, before that, to several regional and bilateral copyright treaties, all of which imposed an obligation of national treatment on their adherents. Since many countries that adhered to the U.C.C. or to one or more of these bilateral and regional agreements belonged to the Berne Union, the national treatment they gave works of U.S. nationals under one of these treaties was effectively the level of protection required of Berne members. Germany, for example, belonged to both Berne and the U.C.C. In giving national treatment to U.S. works under its U.C.C. obligations, Germany was giving them Berne-level protection as well, at least to the extent that German law gave its own nationals the minimum protection required for nationals of other Berne member countries. The principal effect of U.S. adherence to Berne on these already-protected works is that it undergirded the earlier protection with the minimum standards imposed by the latest Berne act to which the protecting country adhered.

(B) Retroactive Berne Protection

Article 18(l) of the Berne Paris Text extends the Convention's requirements "to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection."[21] This provision recaptures protection for works that, though still covered by an unexpired term of protection in their country of origin, have fallen into the public domain in a Berne member country because they had failed to obtain protection under the U.C.C. or a bilateral agreement, for example, or through the back door to Berne. Because retroactive grants of protection to public domain works can prejudice creators of derivative works, such as translations, who relied on the public domain status of the underlying work, Article 18(3) limits the guarantee of retroactivity by allowing domestic exceptions for uses made of the work at the time it was still in the public domain.[22]

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21. Article 5(4) of the Berne Paris Text defines "country origin." On country of origin generally, see §8.3.1.2, below.
22. On retroactive protection generally, see §8.4, below.

§5.1.2 Points of Attachment

The Berne Convention obligates Union members to protect only those foreign literary and artistic works that have some point of attachment (also called a "connecting factor") that links the work to a Union member.[23] Article 3 of the Berne Paris Text provides that a point of attachment exists if the author of the work in question is a national of a Berne Union country[24] or is assimilated to nationals of a Berne Union country by reason of "habitual residence" in that country.[25] Alternatively, if the author is not a national or habitual resident of a Union country, a point of attachment will exist if the work was first published in a Union country "or simultaneously in a country outside the Union and in a country of the Union."[26] If the work enjoys neither of these first two points of attachment, it will nonetheless be entitled to Berne protection if, in the case of a cinematographic work, its maker has its headquarters or habitual residence in a Union country[27] and if, in the case of a work of architecture, it has been erected in a Union country.[28] If it is some other form of artistic work, a point of attachment will exist if it is "incorporated in a building or other structure located in a country of the Union."[29]

§5.1.2.1 Nationality or Residence of Author

Article 3(1)(a) of the Berne Paris Text extends the Convention's protection to "authors who are nationals of one of the countries of the Union, for their works, whether published or not."[30] Article 3(2) adds that "[a]uthors who are not nationals of one of the countries of the Union but who have their habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals of that country."[31] According to the WIPO *Guide to the Berne Convention*, "[t]he idea of habitual residence was preferred to that of domicile because ideas on the latter vary from country to country, whereas the former poses only a question of fact for the courts before which disputes come, namely the extent to which the author has lived in a certain place."

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23. TRIPs Agreement Article (1) incorporates by reference the points of attachment prescribed for literary and artistic works by the Berne 1971 Paris Text. Article 3 of the WIPO Copyright Treaty expressly obligates contracting partners to apply the Berne points of attachment *mutatis mutandis*.
24. *See* Berne Convention, 1971 Paris Text, Art. 3(l)(a). *See generally* §5.1.2.1, below.
25. Berne Convention, 1971 Paris Text, Art. 3(2). *See generally* §5.1.2.1, below.
26. Berne Convention, 1971 Paris Text, Art. 3(l)(b). *See generally* §5.1.2.2, below.
27. *See* Berne Convention, 1971 Paris Text, Art. 4(a). *See generally* §5.1.2.1, below.
28. *See* Berne Convention, 1971 Paris Text, Art. 4(b). *See generally* §5.1.2.1, below.
29. Berne Convention, 1971 Paris Text, Art. 4(b). *See generally* §5.1.2.1, below.
30. Berne Convention, 1971 Paris Text, Art. 3(l)(a).
31. Berne Convention, 1971 Paris Text, Art. 3(2).

Further, the paragraph "covers the special case of stateless persons and refugees."[32]

The provisions making nationality a point of attachment for published works of Union nationals were introduced in Stockholm in 1967[33] and represent a fundamental change in the Berne Convention's approach to points of attachment generally. Until the Stockholm revision, the fact that a work's author was a national of a Union country would ensure Convention protection only for unpublished works. To secure Convention protection for a published work, even a work of a Union national, the work had to be first published in a Union country. This requirement put authors who were Union nationals at the risk that their works would inadvertently be first published in a non-Union country, forfeiting Berne protection. Article 3(l)(a) ensures Berne nationals of protection regardless of the country of first publication. "The result is that from now on the Convention protects the works of authors who are nationals of the countries of the Union (or have their habitual residence in one of them), whether published or not and wherever first published—either in a Union country or elsewhere."[34]

Who is a work's author for purposes of determining whether the work has a point of attachment to a Union country under Article 3? According to the weight of authority, the law of the country in which protection is sought will control the determination of a work's author for purposes of locating a point of attachment. National definitions of authorship may be partially constrained if the widely held view is correct, that the Convention excludes all but flesh-and-blood creators from its conception of authorship.[35] For example, unlike U.S. law, German law does not recognize corporate entities as authors, and a German court will, in determining whether a work has a point attachment, ask only whether the work's flesh-and-blood creator, and not his corporate employer, is a national of a Union country.[36] To the extent that the Berne Convention requires, or at least sanctions, this result, the United States could not complain that Germany has breached its TRIPs obligation to abide by Berne if it declined to recognize the corporate author of a U.S. work for hire as the work's author for purposes of determining whether a point of attachment exists.

What if an author has changed his country of habitual residence, or even his nationality? No less important than the question of *who* is a work's author is the question *when* authorship should be determined for purposes of locating a point of attachment to a Union country. The Berne Convention is silent

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32. WIPO 1978, 27. *See generally* Ricketson 1987, 161–164.
33. *See generally* Ricketson 1987, 161–164.
34. WIPO 1978, 26.
35. *See, e.g.*, Dietz 1993a; Nordemann et al. 1990, 48–49; Ricketson 1987, 157–159; Vaver 1986, 592–593.
36. *See* §7.1., below.

on the issue, leaving resolution to national law, presumably the law of the protecting country. In principle, the country of which the author was a national or in which the author resided at the time of the work's initial exploitation, should be the country that counts for purposes of determining whether there is a point of attachment. This approach, which finds some support in the records of the 1967 Stockholm Conference,[37] best aligns the reasonable expectations of the author and publisher with the scope of the international protection they will receive. This approach also promotes certainty and reduces strategic behavior aimed at belatedly establishing residence in a Union country in order to secure Berne protection.

Article 4 of the Berne Paris Text provides two sets of criteria that can establish points of attachment for cinematographic works and architectural and certain other artistic works that lack a point of attachment under Article 3's provisions on nationality and place of publication. Article 4 provides that "[t]he protection of this Convention shall apply, even if the conditions of Article 3 are not fulfilled, to:

(a) authors of cinematographic works the maker of which has his headquarters or habitual residence in one of the countries of the Union;
(b) authors of works of architecture erected in a country of the Union or of other artistic works incorporated in a building or other structure located in a country of the Union."[38]

The special points of attachment for cinematographic works and architectural and other artistic works were introduced in the 1967 Stockholm Revision in an effort to promote the protection of two classes of works that characteristically resist traditional conceptions of publication.[39] Similarly, since works of architecture and fine art are characteristically only displayed and not distributed in copies, Article 4(b) meets the need for a special point of attachment to protect these highly visible but nonetheless unpublished works.

§5.1.2.2 Country of Publication

If a work's author is not a national or habitual resident of a Berne Union country, there will nonetheless be a point of attachment under Article 3(1)(b) of the Paris Text if the work was first published in a Union country or was simultaneously published "in a country outside the Union and in a country of

37. *See* Ricketson 1987, 162–163.
38. Berne Convention, 1971 Paris Text, Art. 4.
39. *See generally* Ricketson 1987, 169–170.

the Union."[40] It is this provision, and counterpart provisions in predecessor Berne acts, that provide the "back door to Berne" under which nationals of countries outside the Berne Union—most notoriously the United States until its adherence to Berne in March 1989—could obtain Berne protection through the expedient of first or simultaneous publication in a Berne country.

Article 3(3) incorporates the Stockholm Conference's expanded definition of "published works." The first part of the definition was intended to loosen the 1948 Brussels Act formulation, which equated publication with copies being issued and made available to the public in "sufficient quantities."[41] Article 3(3) requires only that "the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work."[42] According to the WIPO *Guide to the Berne Convention*, "for example, cinematograph films are not, unlike books and magazines and papers, placed on sale. The audience takes them in by means of their projection without ever having the celluloid in their possession. Again the orchestral parts of symphonies, often printed in small numbers, are lent to and not bought by the concert impresarios."[43] In a decision concerning an unauthorized sequel to *Doctor Zhivago*, the German Federal Supreme Court stretched the notion of publication to include (first) publication of an Italian *translation* of the work in Italy, thus opening the back door to Berne to this famous Russian novel that would otherwise not have enjoyed copyright protection in Germany.[44]

Article 3(3) also specifies those performances and displays that fall outside its definition of publication: "The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication."[45] Superficially, the distinction between these uses, which "produce only a fleeting impression of the work,"[46]

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40. Berne Convention, 1971 Paris Text, Art. 3(l)(b). When taken together with Article 3(l)(a), this means that non-Union authors can obtain Convention protection only for their published works and, then, only if the work has been first or simultaneously published in a Union country.
41. Berne Convention, 1948 Brussels Text, Art. 4(4).
42. Berne Convention, 1971 Paris Text, Art. 3(3).
43. WIPO 1978, 27–28. "But this wording does not go so far as to allow abuse: it is not enough to show, in the window of a single bookshop, a dozen copies of a book which has enjoyed massive success in some other country outside the Union. Again, a single copy of a cinematographic work sent to a festival to be shown before a restricted audience does not meet the conditions. In neither case are the reasonable requirements of the public satisfied." *Id.* at 28. *See also* Nordemann et al. 1990, 62.
44. Germany, "Lara's Child," Federal Supreme Court, April 29, 1999, 31 (2000) I.I.C. 1050.
45. Berne Convention, 1971 Paris Text, Art. 3(3).
46. Wipo 1978, 28.

and uses that do constitute publication is the distinction between the ephemeral and the tangible. "For a work to be published there must exist something tangible embodying it."[47] Since, however, an ephemeral performance or display can always be tangibly captured in a recording or film, the more precise distinction is between copies that are authorized by the copyright owner and copies, such as those made by an audience member or passerby, that are not.

Whether posting a work on a website or otherwise making it available to the public online qualifies as publication under Berne Article 3, or under the WIPO Copyright Treaty that incorporates the same rule, is a matter of some controversy. On the one hand, many works nowadays are published exclusively online, and denying such works the status of works "published" in a Berne country would arguably run counter to the main purpose of the conventions, that is to foster transnational copyright protection. On the other hand, the near-global reach of the Internet would make every work posted on a website simultaneously published all over the world, which would lead to unmanageable results.[48]

Article 3(1)(b) establishes a point of attachment not only for works first published in a Berne Union country but also for works first published "simultaneously in a country outside the Union and in a country of the Union." Article 3(4) elaborates: "A work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication."[49] For example, if an author who is neither a national nor a habitual resident of a Berne Union country first publishes his work in a non-Union country, he will nonetheless be entitled to Berne protection so long as he also publishes it in a Union country within thirty days of the work's first publication. This route to Berne protection, commonly known as the "back door to Berne," was routinely taken by American authors and publishers during the many years before the United States adhered to the Convention. Books by U.S. authors were commonly published, within days of first publication in the United States, in Canada and/or the United Kingdom, two countries that were Berne members long before the United States joined the Union.

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47. Wipo 1978, 28.
48. For this reason a provision in the draft WIPO Copyright Treaty that would have effectively extended the notion of publication to include making works available online was rejected. *See* Mihály Ficsor, The Law of Copyright and the Internet 78–79 (2002).
49. Berne Convention, 1971 Paris Text, Art. 3(4).

§5.2 Universal Copyright Convention

The Universal Copyright Convention exists in two texts, the original Geneva Text, which came into force in the United States on September 16, 1955, and the 1971 Paris Text, which came into force in the United States on July 10, 1974.[50] As with the Berne Convention and its several texts, substantive differences between the two U.C.C. texts may require a determination in any case of which text governs the protection of a particular work. Like the Berne Convention, the U.C.C. establishes the subject matter classes and points of attachment that will qualify a work for protection.

Article I of the U.C.C. Paris Text extends the Convention's protection to "literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture,"[51] and it does not require member countries to protect such traditionally borderline subject matter as photographic works and works of applied art.[52] Articles III and IV, which deal respectively with formalities and copyright term, effectively exclude from the scope of protected subject matter works that have fallen into the public domain under the law of the protecting country because of noncompliance with prescribed formalities or expiration of term.[53] Further, the Convention's protection is not retroactive: the "Convention shall not apply to works or rights in works which, at the effective date of this Convention in a Contracting State where protection is claimed, are permanently in the public domain in the said Contracting State."[54]

Article II of the U.C.C. Paris Text divides the Convention's points of attachment between published and unpublished works. The provision makes the author's nationality in a contracting state a point of attachment for both published and unpublished works and makes publication in a contracting state a further point of attachment for published works.[55] Article VI defines "publication" to mean "the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived."[56] It is this definition, rather than any definition employed under local law, that will control.[57]

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50. For background on the adoption of the Universal Copyright Convention, see §3.1.3, above. *See generally* Bogsch 1968; Kupferman & Foner 1955.
51. Universal Copyright Convention, 1971 Paris Text, Art. I.
52. *See* Bogsch 1968, 10.
53. *See* Universal Copyright Convention, 1971 Paris Text, Arts. III, IV.
54. Universal Copyright Convention, 1971 Paris Text, Art. VII.
55. *See* Universal Copyright Convention, 1971 Paris Text, Art. II.
56. Universal Copyright Convention, 1971 Paris Text, Art. VI.
57. *See* Bogsch 1968, 68.

More specifically, under Article II(1), "[p]ublished works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory, as well as the protection specially granted by this Convention."[58] Article II(2) provides that "[u]npublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals, as well as the protection specially granted by this Convention."[59] Article II(3) adds that "any Contracting State may, by domestic legislation, assimilate to its own nationals any person domiciled in that State."[60]

The U.C.C., like the Berne Convention, addresses only protection of foreigners and does not obligate member countries to extend Convention-level protection to their own nationals. Must a U.C.C. country nonetheless grant Convention-level protection to a work of its own national if the work was first published in another U.C.C. country? Reading Article II(1)'s requirements as "alternative and not cumulative," but acknowledging that the answer is "not entirely clear," Dr. Bogsch concluded that in this situation the work "seems to qualify as a work first published in another contracting country and thus it ought to be protected. The fact that the work is not a work of a national of another contracting country does not seem relevant since works first published in another contracting country must be protected irrespective of the author's nationality."[61]

§5.3 Other Copyright Treaties

Besides the Berne Convention and the Universal Copyright Convention, various other international or bilateral treaties may link foreign works to local copyright statutes. While some of these treaties deviate from the main conventions and provide different rules on application and points of attachment, other treaties simply incorporate the Berne rules by reference, as does the WIPO Copyright Treaty.[62]

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58. Universal Copyright Convention, 1971 Paris Text, Art. II(1). "It is clear from the construction of this sentence that there are two classes of published works which are subject to the provisions of the Convention: (i) works of nationals of another contracting country, and, (ii) works first published in another contracting country." Bogsch 1968, 12.
59. Universal Copyright Convention, 1971 Paris Text, Art. II(2).
60. Universal Copyright Convention, 1971 Paris Text, Art. II(3).
61. Bogsch 1968, 12.
62. WIPO Copyright Treaty Art. 3.

Between the Chace Act in 1891[63] and adherence to the U.C.C. Geneva Text in 1955, the United States concluded bilateral copyright arrangements with more than fifty nations.[64] It also entered into two multilateral inter-American treaties, the 1902 Mexico City Convention and the 1910 Buenos Aires Convention, which largely superseded it.[65] Since the United States' adherence to the U.C.C., and more recently to the Paris Text of the Berne Convention, these other international arrangements have played a largely interstitial—but often critical—role in establishing whether, and under what terms, a U.S. author of a work created or published before the United States adhered to the U.C.C. or Berne is entitled to copyright protection in another country.[66]

The bilateral and regional copyright treaties differ from each other, and from the U.C.C. and the Berne Convention, in the subject matter they protect and the points of attachment they require. To take one example, the 1892 U.S.-German Copyright Agreement extends protection to simple photographic snapshots that would not have been protected as photographic "works" under either the Berne Convention or domestic German law.[67] These substantive and procedural differences mean that, in determining whether a work originating in the United States is entitled to protection in other countries, it will sometimes be necessary to review the terms of any bilateral or regional treaty between the United States and the other country.

§5.4 TRIPs Agreement

Nationality, though the exclusive point of attachment in the TRIPs Agreement, is not the exclusive point of attachment designated by the intellectual property conventions listed in TRIPs Article 1(3). The Berne Convention, for example, has historically made first publication in a Berne country a point of attachment.[68] Presumably, TRIPs Article 1(3) intended that its operative points of attachment would be not just the nationality criterion but also the points of attachment identified by the particular intellectual property convention that governs the right in issue. Certainly, Article 1(3)'s last sentence, contemplating that a member will avail itself of Article 5(3) or 6(2) of the Rome Convention, which specifies points of attachment other than nationality, reflects such an intention. The discrepancy between nationality as a point

63. *See* Act of March 3, 1891, ch. 565, 26 Stat. 1106.
64. *See* §3.1.1, above.
65. *See* §3.3.2, above.
66. *See* §3.1.5.2, above.
67. *See* §6.1.2.3, below.
68. *See* §5.1.2.2, above.

of attachment under the TRIPs Agreement and place of publication or fixation as points of attachment under the Berne and Rome Conventions can most logically be reconciled by interpreting TRIPs Article 1(3) as extending protection to all nationals of WTO members whether the point of attachment through which they claim protection under one of the conventions is nationality, publication, fixation, or some other criterion.

§5.5 Neighboring Rights Treaties

Three multilateral conventions deal with neighboring rights: the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (commonly called the Rome Convention),[69] the 1971 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (commonly called the Geneva Phonograms Convention),[70] and the 1996 WIPO Performances and Phonograms Treaty,[71] which builds on the Rome Convention. The 1994 TRIPs Agreement[72] also provides minimum standards for neighboring rights.

§5.5.1 Rome Convention

The Rome Convention secures national treatment protection to performers with respect to their performances,[73] phonogram producers with respect to their phonograms,[74] and broadcasting organizations with respect to their broadcasts.[75] The Convention expressly leaves "intact and shall in no way affect the protection of copyright in literary and artistic works."[76] Also, the Convention has no retroactive effect: "a performance or a broadcast taking

69. *See* §3.2.1, above.
70. *See* §3.2.2, above.
71. *See* §3.2.3, above.
72. *See* §3.4.1, above.
73. Article 3(a) of the Rome Convention defines "performers" as "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works."
74. Article 3(b) of the Rome Convention defines "phonogram" as "any exclusively aural fixation of sounds of a performance or of other sounds" and Article 3(c) defines "producer of phonograms" as "the person who, or the legal entity which, first fixes the sounds of a performance or other sounds."
75. Article 3(f) of the Rome Convention defines "broadcasting" as "the transmission by wireless means for public reception of sounds or of images and sounds."
76. Rome Convention, 1961, Art. 1.

place or a phonogram fixed before that date [when the Convention enters into force in a country] need not be given any rights internationally in the State in question."[77] By contrast, the TRIPs Agreement does require retroactive protection for the rights of performers and phonogram producers in existing phonograms.[78] Indeed, the first proceeding initiated under the TRIPs obligation complained of Japan's noncompliance with this provision.[79]

Articles 4 through 6 of the Rome Convention prescribe the points of attachment, respectively, for performers,[80] producers of phonograms,[81] and broadcasting organizations.[82] As under the Berne and Universal Copyright Conventions, the presence of a point of attachment in a country that adheres to the Convention only ensures protection in other Convention countries and not under the domestic law of the country in which the point of attachment exists.[83]

§5.5.1.1 Performers

Article 4 of the Rome Convention prescribes three alternative points of attachment for performers with respect to their performances, any one of which will qualify the performance for protection in other Rome countries. The first of these possible points of attachment for protection in one or more contracting states is that "the performance takes place in another Contracting State."[84] The WIPO *Guide to the Rome Convention and to the Phonograms Convention* offers as an example a case where "a soloist gives a piano recital in Stockholm and the concert is broadcast by Danish radio; this performer may demand the application of the Convention by Denmark. But it will be remembered that in Sweden, where the concert took place, it is the Swedish national law which applies."[85]

As a second alternative, under Article 4 a performance will be protected if it is "incorporated in a phonogram which is protected under Article 5 of this Convention."[86] Finally, a performer will obtain protection for his performance if "the performance, not being fixed on a phonogram, is carried by a broadcast which is protected by Article 6 of this Convention."[87] The WIPO

77. WIPO 1981, 68.
78. *See* TRIPs Agreement Art. 70(2).
79. *See* Lionel S. Sobel, *Retroactive Copyright Protection for Recordings, Japanese Style: An American Diplomatic Triumph . . . Complete with Anomalies and Ironies*, 18 Ent.t L. R. 4 (Feb. 1997).
80. *See* §5.5.1.1, below.
81. *See* §5.5.1.2, below.
82. *See* §5.5.1.3, below.
83. *See* WIPO 1981, 26.
84. Rome Convention, 1961, Art. 4(a).
85. WIPO 1981, 27.
86. Rome Convention, 1961, Art. 4(b). *See* 5.5.1.2, below.
87. Rome Convention, 1961 Art. 4(c). *See* 5.5.1.3, below.

Guide offers as an example the situation where "a quartet plays a number of musical pieces before the microphone in a studio of an Italian broadcasting organization which has the quartet's consent to broadcast in Italy. If it is rebroadcast in the Federal Republic of Germany without the consent of the quartet, the latter may pray the Convention in aid."[88]

Since the nationality of the performer underpins none of the points of attachment in Article 4, the Rome Convention would appear to offer a clear field of protection to performers who are nationals of a noncontracting party—most notably the United States of America. However, in a much-criticized decision, a German court dismissed an action brought by American singer and songwriter Bob Dylan to enjoin the distribution in Germany of copies of a bootleg recording of his live performance in a concert in Italy.[89] Since both Italy and Germany adhere to the Rome Convention, the performance in Italy would, contrary to the court's holding, appear to have provided the point of attachment for protection in Germany under Article 4(a).

§5.5.1.2 Producers of Phonograms

Article 5(l) of the Rome Convention prescribes three points of attachment for phonogram producers, any one of which, if met, will secure protection for the phonogram in a contracting country: "(a) the producer of the phonogram is a national of another Contracting State (criterion of nationality); (b) the first fixation of the sound was made in another Contracting State (criterion of fixation); (c) the phonogram was first published in another Contracting State (criterion of publication)."[90] Article 5(2) effectively augments the publication criterion with a relaxed standard of simultaneous publication: "If a phonogram was first published in a non-contracting State but if it was also published, within thirty days of its first publication, in a Contracting State (simultaneous publication), it shall be considered as first published in the Contracting State."[91]

Article 5's fixation and publication criteria create the opportunity for nationals of a noncontracting country, such as the United States, to obtain Rome-level protection for their phonograms in contracting states through the expedient of recording their production, or first or simultaneously distributing it, in a contracting country. Article 5(3), a compromise between countries that objected to the fixation criterion and countries that objected to

88. WIPO 1981, 27–28.

89. *Bob Dylan*, Federal Supreme Court, November 14, 1985 (Case No. I ZR 68/83) 18 I.I.C. 418, 422 (1987).

90. Rome Convention, 1961, Art. 5(l).

91. Rome Convention, 1961, Art. 5(2). Article 3(d) defines "publication" as "the offering of copies of a phonogram to the public in reasonable quantity."

the publication criterion,[92] partially reduces Article 5(l)'s options by allowing contracting states to elect not to "apply the criterion of publication or, alternatively, the criterion of fixation."[93] The fact that Article 5(3) allows a contracting state to elect out of either, but not both, of these two points of attachment ensures nationals of noncontracting states the possibility of obtaining Rome-level protection through at least one of these two avenues.

§5.5.1.3 Broadcasting Organizations

Article 6 of the Rome Convention establishes two alternative points of attachment for broadcasting organizations to obtain protection for their broadcasts in a contracting state: "(a) the headquarters of the broadcasting organization is situated in another Contracting State" or "(b) the broadcast was transmitted from a transmitter situated in another Contracting State."[94] According to the WIPO *Guide to the Rome Convention*, "it was agreed during the discussion in Rome that by the State where the headquarters of the broadcasting organisation is situated should be understood the State under the laws of which the broadcasting entity was organized. Thus, in the French text 'siège social' should be understood as the equivalent of 'siège statutaire,' and it was also agreed that the legal entity in question may be what is known in German as 'offene Handelsgesellschaft' or 'Kommanditgesellschaft.'"[95] Under Article 6(2), a contracting state may require that both, and not just one, of these two criteria be met for a broadcast to be entitled to protection: "any Contracting State may declare that it will protect broadcasts only if the headquarters of the broadcasting organization is situated in another Contracting State and the broadcast was transmitted from a transmitter situated in the same Contracting State."[96]

§5.5.2 Geneva Phonograms Convention

Unlike the Rome Convention, which protects performers, phonogram producers, and broadcasting organizations, the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms protects only phonogram producers and only against piracy. Like the Rome Convention, the Geneva Phonograms Convention has no retroactive effect; under Article 7(3), "[n]o Contracting State shall be required to

92. *See* WIPO 1981, 30.
93. Rome Convention, 1961, Art. 5(3).
94. Rome Convention, 1961, Art. 6(1).
95. WIPO 1981, 32.
96. Rome Convention, 1961, Art. 6(2).

apply the provisions of this Convention to any phonogram fixed before this Convention entered into force with respect to that State."[97]

As a general rule, the Geneva Phonograms Convention prescribes a single point of attachment, requiring each contracting state to "protect producers of phonograms who are nationals of other Contracting States."[98] Article 7(4) provides the single exception to nationality as the Convention's point of attachment: "Any Contracting State which, on October 29, 1971, affords protection to producers of phonograms solely on the basis of the place of first fixation may, by a notification deposited with the Director General of the World Intellectual Property Organization, declare that it will apply this criterion instead of the criterion of the nationality of the producer."[99]

§5.6 Points of Attachment under National Law

Apart from the operation of international treaties, national laws on copyright or neighboring rights will usually include points of attachment that directly protect foreign authors or other right holders. Such "scope" rules are often complex and detailed, such as the provisions of the U.S. law discussed below. In many other countries, notwithstanding the operation of international treaty obligations, rules requiring reciprocity are still quite common, both in the field of copyright and neighboring rights. Truly universal application of copyright protection remains exceedingly rare, as in the case of the copyright law of Switzerland that offers national treatment to all foreign works, regardless of any relevant international treaty obligations.[100]

§5.6.1 United States

Protection in the United States for works of foreign origin divides between unpublished and published works. Unpublished works enjoy full protection under the 1976 Copyright Act without regard to the domicile or nationality of the author or to any treaty relations between the United States and the work's country of origin.[101] Published works, by contrast, will enjoy protection under

97. Geneva Phonograms Convention, 1971, Art. 7(3).
98. Geneva Phonograms Convention, 1971, Art. 2. Article 1(a) defines "phonogram" as "any exclusively aural fixation of sounds of a performance or of other sounds," and Article 1(b) defines "producer of phonograms" as "the person who, or the legal entity which, first fixes the sounds of a performance or other sounds."
99. Geneva Phonograms Convention, 1971, Art. 7(4).
100. *See* §5.6.2
101. U.S. 1976 Copyright Act §104(a). *See* §5.6.1.1, below.

the 1976 Copyright Act only if they meet one or more of several conditions imposed by section 104 of the Act.[102] The two conditions that provide the most common basis for protection of published foreign works are the existence of copyright treaty relations between the United States and the country in which the work was first published,[103] or between the United States and the country of which the work's author is a national or domiciliary.[104] In many cases, if a work has fallen into the public domain in the United States because of lack of national eligibility,[105] or because the copyright owner failed to comply with a copyright formality applicable under U.S. law at the time of the work's publication, the fact of foreign origin may operate to restore copyright in the work.[106]

The determination whether, and to what extent, a foreign work will be protected under U.S. copyright law will turn in any case on the law in force in the United States at the time of the work's first publication, as well as on the treaty relations, if any, that existed between the United States and the work's country of origin at that time. For example, while the 1976 Copyright Act protects works by foreign authors that were first published in the United States,[107] the 1909 Copyright Act, which preceded it, did not make first publication in the United States a point of attachment. As a result, a work by a foreign author that was first published in the United States before the effective date of the 1976 Act, January 1, 1978, would have had to qualify for protection under some other provision of the 1909 Act if it were not to have fallen into the public domain in the United States.[108] Similarly, a work of a French national first published in France in 1982 will not enjoy protection in the United States under the terms of the Berne Convention, because the United States did not adhere to the Berne Convention until March 1, 1989. Nonetheless, the work would be protected in the United States under the terms of the Universal Copyright Convention, 1971 Paris Text, to which both France and the United States adhered on July 10, 1974.[109]

Once it is determined that a foreign work is protectible under U.S. law, the foreign copyright owner should consult the applicable Copyright Act's ownership rules,[110] as well as the applicable choice of law rules on ownership,[111] to

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102. U.S. 1976 Copyright Act §104(b). *See* §5.6.1.2, below.
103. U.S. 1976 Copyright Act §104(b)(2). *See* §5.6.1.4, below.
104. U.S. 1976 Copyright Act §104(b)(1). *See* §5.6.1.3, below.
105. *See* §5.6.1, below.
106. U.S. 1976 Copyright Act §104A(h)(6). *See* §5.6.1.3, below.
107. U.S. 1976 Copyright Act §104(b)(2). *See* §5.6.1.2, below.
108. Transitional and Supplementary Provisions of 1976 Copyright Act §103.
109. *See generally*, Arpad Bogsch, Protection of Works of Foreign Origin, U.S. Copyright Office, Study No. 32 (1959).
On the hierarchical ordering of treaties, see §3.1.5, above.
110. *See* Chapter 7, below.
111. *See* §4.4.1.1, above.

determine whether it is also the copyright owner in the United States. (The 1976 Copyright Act's rules on copyright ownership differ, in some respects dramatically, from the rules applied in other countries.) Next, the copyright owner should determine whether the work constitutes protectible subject matter under the 1976 Act and, if so, into what subject matter category it falls, since the scope of rights will sometimes vary with the work's subject matter class. A sound recording, for example, will receive less complete copyright protection under the 1976 Act than other forms of copyright subject matter.[112] The copyright owner should then determine the scope of its rights and remedies under the 1976 Act[113] and, finally, ascertain when the term of copyright expires in the United States.[114]

§5.6.1.1 Unpublished Works

Until the 1976 Copyright Act, copyright protection for unpublished works in the United States was the province of state common law rather than federal statutory law. Federal copyright law would protect the work only if, and when, the work was published with the required copyright notice affixed to all publicly distributed copies. State common law copyright imposed no formal conditions to protection, and it protected works of foreign authors, no less than works of U.S. authors, without any requirement of treaty or other relations with the work's country of origin.[115]

The 1976 Copyright Act, which took effect on January 1, 1978, substantially preempted state common law copyright in the United States by making federal statutory protection commence upon a work's fixation rather than upon its publication. As a consequence, state common law copyright has, since January 1, 1978, been confined to unfixed works.[116] Works created, but not published, before January 1, 1978, are protected under the 1976 Act for a statutorily limited term.[117] Like state common law copyright before it, the

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112. *See* §9.2, below.
113. *See* Chapter 9 and Chapter 12, below.
114. *See* Chapter 8, below.
115. *See, e.g.*, Ferris v. Frohman, 223 U.S. 424, 433–435 (1912); Palmer v. DeWitt, 47 N.Y. 532, 538 (1872).
116. Since publication generally turns on the public distribution of copies or phonorecords of a work, cases will rarely arise in which publication will occur without the work's prior fixation. *See* U.S. 1976 Copyright Act §101 (definition of "publication"). *See generally* Goldstein 2005, §3.3.
117. The 1976 Copyright Act limits the term of protection for works created, but not published, before January 1, 1978, by subjecting them to the term of copyright prescribed by the Act generally and providing that in "no case, however, shall the term of copyright in such a work expire before December 31, 2002; and if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047." U.S. 1976 Copyright Act §303(a).

    On the U.S. term of copyright, see Chapter 8, below.

1976 Copyright Act provides that unpublished works will enjoy copyright protection without regard to the nationality or domicile of the author.[118] State common law copyright continues to protect unfixed works without regard to nationality or domicile.

§5.6.1.2 Published Works

Section 104(b) of the 1976 Copyright Act prescribes six basic points of attachment that will qualify a work for protection in the United States if none of the work's authors is a U.S. national or domiciliary and the work was not first published in the United States.[119] A foreign work will be entitled to protection under the Act if, on the date of the work's first publication, one or more of its authors "is a national, domiciliary, or sovereign authority of a treaty party, or is a stateless person, wherever that person may be domiciled";[120] the work was first published "in a foreign nation that, on the date of first publication, is a treaty party";[121] the work "is a sound recording that was first fixed in a treaty party";[122] the work is a pictorial, graphic, sculptural, or architectural work that is incorporated or embodied in a building or other structure located in the United States or in a treaty party;[123] the work was first published by the United Nations or the Organization of American States;[124] or, the work comes within the scope of a presidential proclamation.[125]

The 1976 Copyright Act defines the pivotal term "treaty party" as a "country or intergovernmental organization other than the United States that is a party to an international agreement."[126] The Act defines "international agreement" to include the Berne Convention, the Universal Copyright Convention, the WTO Agreement, the Geneva Phonograms Convention, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, and "any other copyright treaty to which the United States is a party."[127] It is unclear whether the definition's concluding category, "any other copyright treaty," refers to all of the preceding treaties listed, such as the Phonograms Convention, or refers only to those treaties such as the Berne and Universal Copyright Conventions that literally deal with copyright. The most plausible

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118. U.S. 1976 Copyright Act §104(a).
119. The 1976 Copyright Act also extends protection to a work if, on the date of its first publication, one or more of its authors is a U.S. national or domiciliary, or the work was first published in the United States. U.S. 1976 Copyright Act §104(a),(b).
120. U.S. 1976 Copyright Act §104(b)(1).
121. U.S. 1976 Copyright Act §104(b)(2).
122. U.S. 1976 Copyright Act §104(b)(3).
123. U.S. 1976 Copyright Act §104(b)(4).
124. U.S. 1976 Copyright Act §104(b)(5).
125. U.S. 1976 Copyright Act §104(b)(6).
126. U.S. 1976 Copyright Act §101 (definition of "treaty party").
127. U.S. 1976 Copyright Act §101 (definition of "international agreement").

construction of the category is that it refers to all of the treaties included in the definition with the exception of the WTO Agreement, which is neither a treaty nor exclusively concerned with copyright and related rights. This construction would effectively bring within section 104's ambit not only past bilateral copyright treaties, but also future neighboring rights treaties.

(i) Nationality or Domicile

Section 104(b)(1) of the 1976 Copyright Act makes nationality and domicile points of attachment for protection under the Act. A work will be subject to protection if one or more of a work's authors is a U.S. national or domiciliary.[128] For example, in the case of a coauthored work, the work will be protected under the 1976 Act so long as one of the authors is a U.S. national or domiciliary.[129] If none of the work's authors is a U.S. national or domiciliary, the work will nonetheless be subject to protection if, on the date of the work's first publication, one or more of the authors is "a national, domiciliary, or sovereign authority of a treaty party." If one or more of the authors is a "stateless person," the work will be subject to protection regardless of the author's domicile.[130]

What law controls the question of authorship for purposes of determining whether a point of attachment exists under section 104(b)(1)? The question has practical significance in the case of works created in the course of an employment relationship where the employer is a national or domiciliary of one country and the employee is a national or domiciliary of another. If U.S. law controls, the 1976 Copyright Act's work-for-hire provisions[131] may make the employer the author for purposes of determining whether there is a point of attachment. If, however, the law of the work's country of origin controls,

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128. The 1976 Copyright Act does not define "domiciliary" but presumably connects the term to the definition of domicile generally employed in U.S. jurisprudence. *See, e.g.*, Black's Law Dictionary 435 (Bryan Garner ed., 5th ed. 1979) ("The place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning."). *See also* G. Ricordi & Co. v. Columbia Gramophone Co., 258 F. 72–74 (S.D.N.Y. 1919).

129. The U.S. 1909 Copyright Act, which governs works first published before January 1, 1978, did not expressly protect works of which only one coauthor was a U.S. national or domiciliary. Nonetheless, the Act may have implicitly protected such works. *See, e.g.*, G. Ricordi & Co. v. Columbia Gramophone
Co., 258 F.72, 75 (S.D.N.Y. 1919) (alternative holding).

130. The U.S. 1909 Copyright Act, which governs works published before January 1, 1978, did not expressly protect works authored by stateless persons. Nonetheless, at least one court has held that works by stateless persons qualified for protection under the Act. *See* Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F.2d 306, 308, 42 U.S.P.Q. 96 (2d Cir.), *cert. denied,* 308 U.S. 597, 43 U.S.P.Q. 521 (1939).

131. *See* §7.4, below.

and that law recognizes only flesh-and-blood authors, the employee would be considered the work's author.[132] Although the answer is not free from doubt, the weight of authority suggests that the law of the work's country of origin should control the determination of authorship for these purposes.[133] In any event, it is the nationality or domicile of the work's author, and not the nationality or domicile of the work's copyright owner, that governs the work's eligibility for protection under section 104(b)(1).[134] Specifically, if the work's author is a national or domiciliary of the United States or of a qualifying foreign country on the date of first publication, the Act will protect the work even though the copyright owner is not a national or domiciliary of the United States or of a qualifying foreign country.

(ii) Place of Publication

A work's first publication in the United States or in a foreign country that is a treaty party on the date of first publication will qualify the work for U.S. copyright protection under section 104(b)(2) of the 1976 Copyright Act. As amended on October 28, 1998, by the Digital Millennium Copyright Act,[135] section 104(b) provides that, for purposes of section 104(b)(2), "a work that is published in the United States or a treaty party within 30 days after publication in a foreign nation that is not a treaty party shall be considered to be first published in the United States or such treaty party, as the case may be."

The determination whether first publication constitutes a point of attachment entitling a work to protection under U.S. law requires consideration of the conditions that the U.S. Copyright Act imposed for this point of attachment on the date the work was first published. Between March 1, 1989, the effective date of the Berne Implementation Act, and October 28, 1998, the effective date of the Digital Millennium Copyright Act's amendment of section 104(b), the thirty-day grace period applied only to "Berne Convention works," defined in part as a "work first published in a nation adhering to the Berne Convention, or . . . simultaneously first published in a nation adhering to the Berne Convention and in a foreign nation that does not adhere to the Berne Convention."[136] Between January 1, 1978, the effective date of the 1976 Copyright Act, and March 1, 1989, there was no provision for a grace period for this point of attachment. Since the 1909 Copyright Act did not make first publication in the United States a basis for protection at all, the first

132. *See* §7.4, below.
133. *See* §4.4.1.1, above.
134. *See, e.g.*, Bong v. Alfred S. Campbell Art Co., 214 U.S. 236, 245–247 (1909) (construing Act of March 3, 1891).
135. Pub. L. 105-304, 112 Stat. 2862 (October 28, 1998).
136. U.S. 1976 Copyright Act §101 (definition of "Berne Convention work") (repealed).

publication in the United States of a work by a foreign author before January 1, 1978, did not constitute a point of attachment entitling the work to protection.

(iii) Presidential Proclamation

Like the 1909 Copyright Act, the 1976 Copyright Act extends copyright to foreign works that come within the scope of a presidential proclamation that the work's country of origin has complied with a requirement or requirements imposed by the United States. Where the 1909 Act required a finding that the country of origin gave national or reciprocal treatment to U.S. works or was party to a reciprocity-based treaty to which the United States could adhere,[137] the 1976 Act requires a finding of national treatment alone: "Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States or to works that are first published in the United States, copyright protection on substantially the same basis as that on which the foreign nation extends protection to works of its own nationals and domiciliaries and works first published in that nation, the President may by proclamation extend protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation, or which was first published in that nation."[138]

A presidential proclamation is both a necessary and a sufficient condition to protection under section 104(b)(6) of the 1976 Copyright Act and the predecessor provision of the 1909 Act. Even if the foreign country meets the conditions required for the necessary presidential finding, this fact alone will not provide a point of attachment; the presidential proclamation must issue for a point of attachment to exist.[139] Similarly, the issuance of a presidential proclamation concludes the question of the foreign country's compliance with the statutory standards, and a court will not look behind a proclamation to determine whether in fact the standards have been met.[140] An opinion of the U.S. Attorney General has concluded both that the proclamation should identify the date on which the foreign country met the conditions prescribed by the statute, and that the copyright owner of the foreign work can recover for infringements occurring after that date.[141]

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137. U.S. 1909 Copyright Act §9(b).
138. U.S. 1976 Copyright Act §104(b)(6).
139. *See* Bong v. Alfred S. Campbell Art Co., 214 U.S. 236 (1909). *See also* Chappell & Co. v. Fields, 210 F. 864 (2d Cir. 1914).
140. *See* Chappell & Co. v. Fields, 210 F. 864, 866 (2d Cir. 1914).
141. *See* 29 Ops. Atty Gen. 64, 70–72 (1911). Proclamations made under the 1909 Act continue in force according to their terms under the 1976 Act. *See* 1976 U.S. Copyright Act Transitional & Supplementary Provisions §104.

(iv) Place of Fixation

Section 104(b)(3) of the 1976 Copyright Act, added by the 1998 Digital Millennium Copyright Act amendments, provides as a point of attachment that "the work is a sound recording that was first fixed in a treaty party." Since section 102 of the 1976 Copyright Act assimilates sound recordings to other forms of copyright subject matter, this provision represents an additional, rather than an exclusive, point of attachment for sound recordings. For example, a sound recording first published in the United States or in a treaty country will similarly enjoy a point of attachment under section 104(b).

Under section 104(b)(4) of the 1976 Copyright Act, a pictorial, graphic, or sculptural work will be entitled to protection in the United States if it is incorporated in a building or other structure located in the United States or in a treaty party; architectural works embodied in a building receive the same treatment. Like section 104(b)(3)'s extension of a special point of attachment in the case of sound recordings, this point of attachment supplements the points of attachment prescribed in the other provisions of section 104(b). For example, a mural created by a national of a treaty party and installed in a building located in another treaty party will be entitled to protection under section 104(b)(1) as well as under section 104(b)(4). Although the provision conforms U.S. copyright law to the requirements of the Berne Convention, 1971 Paris Act,[142] it extends to all treaty parties and not just those that are members of the Berne Union.

§5.6.1.3 Retroactive Protection for Works Lacking a Point of Attachment

Section 104A of the 1976 Copyright Act, as amended by the 1994 Uruguay Round Agreements Act, restores U.S. copyright to qualifying foreign works that forfeited copyright for any one or more of several reasons, including failure to meet the national eligibility requirements earlier imposed by U.S. law.[143] Copyright in the restored work "shall subsist for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States."[144] An Administrative Action Statement on the Uruguay Round Amendments gives as an example of restoration of copyright under section 104A the following

142. Berne Convention, 1971 Paris Text, Art. 4(b).

143. Section 104A(h)(6) defines "restored work" to include not only works that fell into the public domain for lack of national eligibility, but also for noncompliance with copyright formalities such as affixation of copyright notice and renewal of copyright term, and for lack of subject matter protection in the case of sound recordings fixed before February 15, 1972. *See* §8.4, below.

144. U.S. 1976 Copyright Act §104A(a)(1)(3).

case: "a Chinese play from 1983 will be protected until December 31st of the fiftieth year after the year in which the author dies."[145]

For copyright in a work to be restored under section 104A, the work must meet three requirements: it cannot be in the public domain in its source country through expiration of its term of protection there;[146] it must have at least one author or right holder "who was, at the time the work was created, a national or domiciliary of an eligible country";[147] and, if the work was published, it must have been "first published in an eligible country and not published in the United States during the 30-day period following publication in such eligible country."[148] The Act defines "eligible country" to include a nation other than the United States that becomes a member of the World Trade Organization after the date of enactment of the Uruguay Round Agreements Act; is a member of the Berne Union; effective upon the entry into force with respect to the United States, has adhered to the WIPO Copyright Treaty or the Performances and Phonograms Treaty; or becomes subject to a presidential proclamation.[149] Restored copyrights vest automatically on the date of restoration—January 1, 1996, in the case of works whose source country was, on that date, a member of the World Trade Organization or of the Berne Union.[150]

§5.6.1.4 Moral Rights and Neighboring Rights

Moral rights and neighboring rights in the United States are variously protected under federal and state law. Federal law, for example, protects the moral right of integrity through the Copyright Act's grant of an exclusive derivative right in section 106[151] and section 106A's special provision for authors of works of visual art,[152] as well as under federal unfair competition law.[153] An assortment of doctrines—defamation, privacy, publicity, contract, unfair competition—can also protect reputational interests in a work's

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145. Uruguay Round Agreements Act, Statement of Administrative Action, Pub. L. No. 103-465, 1994 U.S.C.A.A.N. 4040, 4290.
146. U.S. 1976 Copyright Act §104A(h)(6)(B).
147. U.S. 1976 Copyright Act §104A(h)(6)(D).
148. U.S. 1976 Copyright Act §104A(h)(6)(D).
149. U.S. 1976 Copyright Act §104A(h)(3).
150. U.S 1976 Copyright Act §104A(h)(2)(A). In the case of any other source country of the restored work, the date of restoration is the date of the country's adherence to the Berne Convention or membership in the WTO, or the date of the relevant presidential proclamation. §104A(h)(2)(B).

    The operation of the restoration provision is discussed further at §8.4, below.
151. United States, 1976 Copyright Act §106(2). *See* §10.2, below.
152. U.S. 1976 Copyright Act §106A(a)(3). *See* §10.2, below.
153. 15 U.S.C. §1125 (a)(1) (2006). *See* §10.2 below.

integrity, as may state legislation protecting fine art.[154] The distinction between state and federal law is important, since some, but not all, federal law in this area imposes conditions on protection for foreign works, while state law requires no point of attachment. For a work of foreign origin to enjoy derivative rights under section 106, or protection under section 106A, it must meet the conditions imposed by section 104. By contrast, neither federal unfair competition law nor any of the applicable state law doctrines imposes any conditions on protection of foreign authors or works.

Moral rights other than the right of integrity are also protected under federal and state law in the United States. Section 106A of the 1976 Copyright Act rigorously protects the right of attribution, but only in the case of qualifying works of visual art, and only if the work has a point of attachment under section 104 of the 1976 Copyright Act. Federal and state unfair competition doctrines, and contract and tort rules, offer less rigorous protection for the attribution right but do not require a point of attachment. The moral right of disclosure is substantially embodied in the 1976 Act's exclusive right of distribution to the public,[155] and the right of withdrawal is partially effected by the Act's provision for termination of transfers.[156] Both provisions require compliance with section 104's conditions for protection in the United States.

Federal copyright law in the United States encompasses rights and subject matter that in many other countries are protected under doctrines of neighboring rights. The 1976 Copyright Act confers limited rights on performers and record producers who fix their sound recordings in phonorecords. Broadcasters also enjoy protection for their contributions under the Copyright Act.[157] Because these works come within the Copyright Act, they must, to be protected, meet the conditions imposed by section 104. Unfixed works, which are generally protected under the state law doctrine of common law copyright, do not require a point of attachment to qualify for protection in the United States.[158] Federal antibootlegging provisions, enacted as part of the implementation of the TRIPs Agreement in U.S. law,[159] augment state law protection of unfixed works by imposing civil and criminal liability on the unauthorized fixation, distribution, or transmission of "the sounds or sounds and images of a live musical performance in a copy or phonorecord"[160] and impose no conditions of nationality or domicile on protection.

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154. *See* §10, below.
155. U.S. 1976 Copyright Act §106(3). *See* §10.3, below.
156. U.S. 1976 Copyright Act §§203, 304(c). *See* §10.4, below.
157. *See* §6.2, below.
158. *See* §5.6.1.1, above.
159. Pub. L. No. 103-465, 108 Stat. 4809 (1994).
160. 17 U.S.C. §1101 (2006).

§5.6.2 Other Countries

Like the United States, many jurisdictions include certain points of attachment in their copyright or neighboring rights laws that directly protect foreign authors or right holders apart from the operation of international treaties. Most countries will protect foreign authors who reside within their borders and will protect works that are first published, or "simultaneously" published, in their national territories. In addition, the Member States of the European Union and of the European Economic Area will extend protection to citizens of other E.U. or E.E.A. Member States, either by direct operation of law[161] or by virtue of Article 12 of the E.C. Treaty, which prohibits discrimination against E.C. nationals.[162]

The German law comes close to the ideal of a truly universal copyright law by extending a complete set of moral rights to foreigners, even in the absence of a relevant international treaty obligation.[163] Although France was once the reputed champion of truly universal copyright protection, this title now belongs to Switzerland. In marked contrast to its predecessor legislation, the current Swiss Act, which entered into force in 1993, imposes no special conditions whatsoever on the protection of foreign works. Such works are therefore protected in Switzerland on equal footing with Swiss works, even in those (increasingly rare) cases in which a work originates in a non-Berne and non-WTO country.[164]

Until the law was changed in France in 1964, it was generally believed that French law had a similarly universal scope. In a famous decision (*Rideau de fer*), the Court of Cassation considered that foreigners have all the rights in France that are not expressly denied to them and went on to protect a work of Soviet origin, notwithstanding the absence—at the time—of any conventional relationship between France and the Soviet Union.[165] The law of 1964 brought this legend to an end and in its present form denies copyright protection to works originating in states that do not adequately protect French works.[166] Somewhat similar rules of reciprocity exist in many other jurisdictions, such as Belgium[167] and Germany.[168] For works originating in member

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161. *See, e.g.*, Germany, Copyright Act Art. 120(2)(2).
162. *See* §3.3, above.
163. Germany, Copyright Act Art. 121(6).
164. François Dessemontet, *Switzerland* § 6[1][a], in INTERNATIONAL COPYRIGHT LAW AND PRACTICE (Paul Edward Geller ed., Lexis Nexis 2009).
165. *Rideau de fer*, Court of Cassation December 22, 1959, 28 (1960) R.I.D.A. 361; *see* André and Henri-Jacques Lucas, Traité de la Propriété littéraire et artistique 791 (2006).
166. France, Intellectual Property Code Art. L 111-4.
167. Belgium, Copyright Act Art. 79.
168. *See, e.g.*, Germany, Copyright Act Art. 121(4).

countries of the Berne Union, the WTO, or the European Union/European Economic Area, discriminatory scope rules are superseded by the national treatment and antidiscrimination rules of the relevant instruments. The remaining relevance of such discriminatory rules will thus be felt mostly in fringe areas, such as *droit de suite*.[169] Indeed, the E.U. Resale Rights Directive of 2001, which harmonized *droit de suite* across the European Union, effectively obligates Member States of the European Union to limit the application of the resale right to nonresidents who are nationals of foreign countries that themselves grant resale rights to E.U. nationals.[170] To this end the European Commission is charged with publishing an "indicative list" of countries that do so.[171]

Scope rules requiring material reciprocity are far more common in the domain of neighboring rights, where the reach of international agreements is considerably shorter, national treatment obligations are less extensive, and reciprocity in certain instances is expressly permitted. Countries bound by the main conventions in the field of neighboring rights, such as the Rome Convention and the WIPO Performances and Phonograms Treaty, will usually avoid extending national treatment to performers, phonogram producers, or broadcasters that do not qualify for international protection under these treaties. In some instances, however, national legislators have cast the net of application more broadly. For example, the Neighboring Rights Act of the Netherlands—party to the Rome Convention—applies not only to nationals of that convention, but also to performers whose phonograms are first recorded in countries party to the Geneva Phonograms Convention, which the Netherlands has also adhered to.[172] As a consequence, American performers may claim rights of remuneration under the Dutch private recording levy scheme, even though the United States is not party to the Rome Convention.[173] By contrast, other European countries, such as France and Belgium, tend to be much less generous in opening their neighboring rights levy schemes to foreigners.[174]

The E.U. harmonization directives mostly leave it to the member states to determine the application of harmonized rights to foreigners, taking into account the international conventions that are part of their *acquis* (namely, the Berne and Rome Conventions) and the equal treatment obligation of the

169. *See, e.g.*, France, Intellectual Property Code Art. L 122-8; Belgium, Copyright Act Art. 11(4).
170. E.C. Resale Right Directive Art. 7(1).
171. E.C. Resale Right Directive Art. 7(2).
172. Netherlands, Neighboring Rights Act Art. 32(1)(c) in conjunction with Art. 32(2)(b).
173. Thuiskopie v. NORMA and IRDA, Supreme Court of the Netherlands, November 13, 2009, LJN: BJ7324.
174. France, Intellectual Property Code Art. L 311-2 (levies only due for phonograms and videograms fixed for the first time in France). Belgium, Copyright Act Art. 79 (4).

E.C. Treaty. A notable exception is Article 11 of the E.U. Database Directive that precisely designates the beneficiaries of the *sui generis* database right. This right shall apply to databases whose makers or right holders are nationals of a member state or who have their habitual residence in the territory of the Community.[175] Companies and firms formed in accordance with the law of a member state and having their registered office, central administration, or principal place of business within the Community may also benefit from the *sui generis* right.[176] The Council of the European Union may extend *sui generis* protection to nationals or residents of third countries on the basis of special agreements with such countries.[177]

175. E.U. Database Directive Art. 11(1).
176. E.U. Database Directive Art. 11(2).
177. E.U. Database Directive Art. 11(3).

PART

II

Substantive Copyright Law

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CHAPTER

6

Subject Matter of Copyright and Neighboring Rights

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Copyright systems around the world have historically protected a wide array of intellectual productions created through traditional forms of individual authorship. Novels, dramas, and poems have long come within copyright subject matter, as have musical compositions, paintings, drawings, and prints. However, legislation varies from country to country in the treatment of less traditional forms of creative productions, particularly those that are connected to industrial or information technology and are the product of team effort rather than individual authorship. Industrial design, for example, often receives special treatment because its connection to technological arts places it in a borderland between copyright and patent law. Many countries treat sound recordings specially because of the technological means essential to their creation, while several countries, including the Member States of the European Union, have special regimes for databases that reward investment rather than authorship. Another reason for treating such productions differently is that they are characteristically the product of collaborative, rather than individual, creativity.

Civil law countries have generally, but not consistently, consigned protection of collaborative technological productions to regimes of neighboring rights. Common law countries, with their utilitarian emphasis on the products rather than the processes of creative work, have generally, but not consistently, included these productions in the subject matter of copyright, alongside such traditional objects as novels and musical works. The U.S. Copyright Act, for example, includes broadcasts and all forms of performance, not just sound recordings, among its copyrightable works, giving them the same term of protection as it does more traditional classes of copyright subject matter.[1] The 1988 Copyright, Designs and Patents Act in the United Kingdom characterizes sound recordings, broadcasts, and the typographical format of published works as copyrightable works; however, the Act identifies the authors of these works differently than it does the authors of more traditional works and extends a shorter term of protection to them.

Because important questions, such as the availability of protection for foreign works, as well as ownership, term of protection, and rights, may turn on whether a production comes within copyright or some other system, it is important in any case to determine the classification that the protecting country employs. At the same time, it is impossible to predict with confidence whether a national legislature will decide to bring a new form of subject matter into copyright or leave it to some other system of protection. Computer programs, for example, are both technological and collaborative products and, during their early history, were widely thought to be the natural object of *sui generis* protection; indeed, at one time there was a concerted

1. *See* §6.2, below.

international movement in this direction.[2] Nonetheless, by the 1990s copyright protection for computer programs as literary works had become an international norm within the framework of the Berne Convention, Paris Act.[3]

The Berne Convention has proved sufficiently flexible to accommodate the relatively expansive notions of common law countries about protectible subject matter, while leaving it to other treaties to prescribe international norms for the subject matter that civil law countries generally consign to neighboring rights. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, commonly called the Rome Convention, prescribes minimum standards for rights in performances, phonograms, and broadcasts.[4] (The United States, which is not a party to the Rome Convention, protects this subject matter under copyright, although without the minimum rights prescribed by the Rome Convention.) Neighboring rights are also protected under the 1996 WIPO Performances and Phonograms Treaty,[5] the 1971 Geneva Phonograms Convention,[6] the 1974 Brussels Satellite Convention,[7] Article 14 of the TRIPs Agreement,[8] and various bilateral arrangements.[9]

§6.1 Literary and Artistic Works

Article 2(1) of the Berne Convention's Paris Text defines "literary and artistic works" in the most encompassing terms, to "include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression."[10] Every country that has adhered to the Paris Text or to the TRIPs Agreement, which in Article 9(1) incorporates the Berne Paris Text by reference,[11] has effectively obligated itself to protect "literary and artistic works" within Berne's expansive terms:

> every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other

2. *See* International Bureau of the World Intellectual Property Organization, *Model provisions on the protection of computer software* (1978).
3. *See* TRIPs Agreement Art. 10(1); WIPO Copyright Treaty Art. 4.
4. *See* §3.2.1, above.
5. *See* §3.2.3, above.
6. *See* §3.2.2, above.
7. *See* §3.2.4, above.
8. *See* §3.4.1.5, above.
9. *See* § 3.4.2, above.
10. Berne Convention, 1971 Paris Text Art. 2(1).
11. TRIPs Agreement Art. 9(1).

> writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.[12]

Article 2 of the Berne Paris Text further requires protection for derivative works, such as translations and adaptations,[13] and collective works, such as encyclopedias and anthologies, "which, by reason of the selection and arrangement of their contents, constitute intellectual creations."[14] In addition to effectively incorporating the Berne Convention's definition of protected subject matter, the TRIPs Agreement and the WIPO Copyright Treaty require member states to protect computer programs and compilations of data or other material.[15]

Article 2's encompassing terms are open to varying interpretations from one country to another. Further, Article 2 establishes a floor, not a ceiling, to protectible subject matter and leaves member countries free to add other categories. The U.S. Copyright Act, for example, protects sound recordings, broadcasts, and other fixed performances as copyrighted works.[16]

In national law, the overarching notion of a "literary or artistic work" goes by many names: "work of authorship,"[17] "work,"[18] "works of the mind,"[19] "literary, scientific and artistic work,"[20] among others. The E.C. Directives refer to subject matter protected by copyright, rather inconsistently, as a "literary or artistic work within the meaning of Article 2 of the Berne Convention,"[21] "copyright works,"[22] or simply "works."[23]

National legislation typically emulates the Berne Convention's generous definition of "literary and artistic works" as "every production in the literary, scientific and artistic domain, whatever may be the mode or form of

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12. Berne Convention, 1971 Paris Text Art. 2(1).
13. Berne Convention, 1971 Paris Text Art. 2(3).
14. Berne Convention, 1971 Paris Text Art. 2(5). *See also* WIPO Copyright Treaty Art. 3.
15. TRIPs Agreement Art. 10; WIPO Copyright Treaty Arts. 4, 5.
16. U.S. 1976 Copyright Act §102(a).
17. U.S. 1976 Copyright Act §101(a).
18. United Kingdom, Copyright, Designs and Patents Act 1988 Art. 1.
19. France, Intellectual Property Code Art. L112-1.
20. Germany, Copyright Act Art. 1.
21. EC Term of Protection Directive Art. 1.
22. EC Rental Right Directive Art. 1(1).
23. EC Information Society Directive Art. 2(1).

its expression."[24] The determination whether a production constitutes protectible subject matter under a country's copyright legislation requires inquiry, first, into whether the expression comes within one of the subject matter categories prescribed by that legislation[25] and, if it does, whether the subject matter meets the law's minimum qualitative standards.[26]

National laws usually impose not only a floor but also a threshold to protection. From the start, Berne's reference to every production in the "scientific" domain was not intended to include technological inventions, which were the subject of the roughly contemporaneous Paris Convention for the Protection of Industrial Property.[27] "Science" in nineteenth-century usage generally meant "knowledge," and this was presumably what Berne's framers had in mind when they used the term.[28] Similarly, Article 2's use of the term "every production" cannot be divorced from the object stated in Article 1—"protection of the rights of *authors*"[29]—or from the premise that only truly authorial works deserve protection. Although the Berne Convention nowhere defines "author" or "work," commentators generally agree that, as Adolf Dietz put it, "the *jus conventionis* has been founded on the concept of author in the sense of the *natural person* who has created the work, as philosophical, semantic and systematic arguments show."[30]

§6.1.1 Standards for Protection

The normal standard for protection of literary and artistic works, applied across both common law and civil law systems, is that the work distinctively be the product of its author's intellectual efforts and not be copied from some other work or works. This nearly universal emphasis on authorial presence as

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24. Berne Convention, 1971 Paris Text Art. 2(1).
25. *See* §6.1.2, below.
26. *See* §6.1.1, below. If the literary or artistic creation fails either requirement, it may nonetheless qualify for protection under one or more neighboring rights.
27. Paris Convention for the Protection of Industrial Property of March 20, 1883.
28. Berne's drafters evidently borrowed the term from earlier bilateral conventions. *See* Ricketson 1987, 232. The term now seems largely meaningless. As Professor Ricketson points out, "[T]he adjective 'scientific' in the context of 'literary and artistic works' seems unnecessary, as works concerned with scientific matters will invariably be either literary productions (a written description of an experiment, process, device, or the like) or artistic productions (diagrams, drawings, illustrations)." *Id.*
29. Berne Convention, 1971 Paris Text Art. 1 (emphasis added).
30. Dietz 1993a, 10–12 (footnote omitted). *See also* Ricketson 1987, 159; Nordemann et al. 1990, 48–49; Vaver 1986, 577, 592. *But see* Stephen M. Stewart & Hamish Sandison, International Copyright and Neighbouring Rights, 113–114 (2d ed. 1989) ("Common law legislations and others influenced by them recognise legal entities . . . as original right owners.").

the standard for protection explains the widespread assumption that the Universal Copyright Convention,[31] no less than the Berne Convention,[32] predicates protection for the product of human intellect and creativity.[33]

Countries following the common law tradition characteristically phrase the test in terms of originality, to connote that the work originated with its author and no one else.[34] The U.S. Supreme Court has ruled that "[t]he copyright of the book, if not pirated from other works, would be valid without regard to the novelty, or want of novelty, of its subject matter."[35] According to a 1916 English Chancery decision, "[t]he originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author."[36]

Courts in civil law countries usually look for some imprint of the author's personality. The German legislation, for example, requires that the work be a "personal intellectual creation,"[37] and the Italian legislation contemplates "[i]ntellectual works having a creative character."[38] The Continental requirement of an authorial impress should not, however, be mistaken for a particularly elevated standard of originality. German law protects such so-called *kleine Münze*, or "small change," as operating instructions[39] and headnotes for judicial decisions,[40] while the Dutch Copyright Act's protection for "all other writings" together with "books, pamphlets, newspapers, periodicals"[41] has been interpreted to encompass "even the most banal or trivial writings," such as radio and television listings, address books, and telephone directories,

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31. Universal Copyright Convention, 1971 Paris Text Art. I.
32. Berne Convention, 1971 Paris Text Arts. 1, 2.
33. *See generally*, Bogsch 1968, 7; Nordemann et al. 1990, 43.
34. *See, e.g.*, United Kingdom, Copyright, Designs and Patents Act 1988 §1(1)(a) ("original literary, dramatic, musical or artistic works"); Canada, Copyright Act §4(1) ("original literary, dramatic, musical and artistic work"), DRG Inc. v. Datafile Ltd. (1987) 18 C.P.R. (3d) 538, 550, 27 C.I.P.R. 136 (Fed. Ct.), aff'd (1991) 35 C.P.R. (3d) 243 (Fed. C.A.) (holding that a system of color-coded labels for file folders satisfied the originality requirement of the Canadian Copyright Act because the creator made a substantial contribution); Australia, 1991 Copyright Amendment Act §32 ("original literary, dramatic, musical or artistic work").
35. Baker v. Selden, 101 U.S. 99, 102 (1879).
36. University of London Press, Ltd. v. University Tutorial Press, Ltd. [1916] 2 Ch. 601, 608–609.
37. Germany, Copyright Act §2(2) (1993) ("Personal intellectual creations alone shall constitute works within the meaning of this Law."). *See generally* Schricker 1997, 484–85.
38. Italy, Copyright Act Art. 1.
39. *Bedienungsanweisung* ("Operating Instructions"), German Federal Supreme Court, Oct. 10, 1991, (Case No. I ZR 147/89) 23 I.I.C. 846 (1992).
40. *Leitsätze* ("Headnotes"), German Federal Supreme Court, Nov. 21, 1991, Case No. I ZR 190/89, 24 I.I.C. 668 (1993).
41. Netherlands, Copyright Act Art. 10(1).

"provided they have been published or intended for publication."[42] Although French law does not expressly extend protection to works possessing only a low level of originality, the tradition of substantial deference to trial court fact findings on originality may effectively support a lower standard from case to case.[43]

General agreement also exists on what elements are *not* required for a work to be protected. A work need not be novel in the sense that it did not exist before it was created by the author. For example, as Professor Jane Ginsburg has observed, under the French test for originality, "it is possible to have two identical protected works, so long as they were independently created."[44] Similarly, in the United States, Judge Learned Hand captured the essence of this rule in his observation that "if by some magic a man who had never known it were to compose anew Keats's *Ode on a Grecian Urn*, he would be an 'author,' and, if he copyrighted it, others might not copy the poem, though they might of course copy Keats's."[45]

Courts will not as a rule inquire into a work's aesthetic merit[46] or into its objects; they will judge the work strictly on the author's contribution and not the ends—aesthetic or otherwise—to which he applies it.[47] At one time in the United States, courts required some showing of aesthetic merit as a condition to copyright. But in 1903, in a case involving circus posters, the Supreme Court rejected such a qualitative threshold on the ground that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations."[48] Products of utilitarian design represent the principal exception to this general rule,

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42. Hugenholtz 1996, 135.
43. *See* André Françon, *News from France*, 165 R.I.D.A. 94, 112–114 (1995).
44. Ginsburg 1989, 274.. *See also* Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co., 3 C.P.R. (3d) 81 (B.C.) (1984) (holding that an advertising brochure was copyrightable even though it was composed of elements that have been used by other advertisers).
45. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936).
46. *See, e.g.*, Ginsburg 1989, 274; "Photograph," Supreme Court of Belgium, April 27, 1989, 22 I.I.C. 272 (1991). *See also* WIPO 1978, 13 ("It is generally agreed that the value or merit of a work, essentially a subjective value judgement, is also of no account; in trying a case, for example, the judge does not have to appreciate the artistic merits or cultural advantages of a work.").
47. *See, e.g.*, Carreau, *Merit and Copyright*, 109 R.I.D.A. 13 (1981); Ricketson 1987, 231; WIPO 1978, 13 ("[the work] may be produced for purely educational purposes or with a merely utilitarian or commercial aim, without this making any difference to the protection it enjoys."). *See also* France, Intellectual Property Code Art. L. 112-1 ("The provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose.").
48. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

possibly because the absence of a unified, sustaining rationale for this subject matter has opened the door to subjective judgments on aesthetic quality.[49]

The generalized standard of originality applies to all classes of literary and artistic works, from high art to lowly directories, catalogues, and instruction manuals. Because, however, factual works like catalogues draw so heavily on unprotectible data, and because functional works like instruction manuals must, if they are to have any value, precisely track the relevant scientific principles or technological requirements, courts in both civil law and common law countries scrutinize these classes of subject matter with particular care.

In *Feist Publications, Inc. v. Rural Telephone Service Co.*,[50] the U.S. Supreme Court rejected copyright protection for alphabetized telephone directory white pages and ruled that, although originality traditionally "means only that the work was independently created by the author (as opposed to copied from other works)," it also requires, in cases such as these, that the work possess "at least some minimal degree of creativity."[51] The Court noted, however, that "the requisite level of creativity is extremely low; even a slight amount will suffice."[52]

In *CCH Canadian Ltd. v. Law Society of Upper Canada*,[53] the Canadian Supreme Court located the originality standard for factual works between the generally applied standard, which requires only that the work be more than a "mere copy," and the more elevated "creativity" standard adopted in *Feist* (although, the Court observed, "creative works will by definition be 'original'").[54] The Court ruled that these works need only "be the product of an author's exercise of skill and judgment," but that the exercise of skill and judgment "must not be so trivial that it could be characterized as a purely mechanical exercise."[55] Applying this test, the Court ruled that a law publisher's headnotes, case summaries, topical index, and compilation of case materials met the "skill and judgment" standard.[56] The 2009 decision of

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49. *See* §6.1.2.10, below.
50. 499 U.S. 340 (1991).
51. 499 U.S. at 345.
52. 499 U.S. at 345. Courts in other common law jurisdictions have similarly imposed a higher originality standard on fact works, although not necessarily at the same level as imposed by *Feist*. *See, e.g.*, Eastern Book Co. v. D.B. Modak, [2008] (36) P.T.C. 1 (S.C.) (India), where the Supreme Court of India adopted the test of "skill and judgment with flavour of creativity." The Court held that copy-edited versions of Supreme Court judgments did not satisfy the test because "original or innovative thoughts are necessary to establish copyright in the author's work." The editorial work of the law publisher presented mere "trivial variations or inputs," which are insufficient to comply with the originality requirement.
53. 2004 SCC 13, 236 D.L.R. (4th) 395, 317 N.R. 107, 30 C.P.R. (4th) 1.
54. *Ibid.* ¶25.
55. *Ibid.* ¶25.
56. *Ibid.* ¶88.

Australia's High Court in *Ice TV Pty Ltd. v. Nine Network Australia Pty Ltd.*[57] imposed a comparable originality standard, holding that the notation of time and title information in a television program guide "is not a form of expression which requires particular mental effort or exertion" and, indeed, was "dictated by the nature of the information." Although the plaintiff may have invested the required "skill and labour" in the programming decisions and selection and presentation of program information that underlay the expression of times and titles, since it was only the latter that the defendant appropriated, the action for infringement failed.

Creativity as an element of the originality requirement has a longer history in civil law than in common law countries. Germany at one time commonly applied a higher standard of creativity to functional works such as computer programs that occupy the margins of traditional authorship.[58] The Dutch Supreme Court has similarly imposed on the collection of words in a dictionary the stringent test that it "result from a selection process expressing the author's personal views";[59] this strict standard is in marked contrast to the easy protection nonoriginal writings otherwise receive under Dutch copyright law.[60] But, particularly in the European Union, the trend is toward a uniform standard: the criterion of "the author's own intellectual creation" that is enshrined, for three distinct categories of subject matter (computer programs, databases, and photographs), in the European Directives.[61] Arguably, if any categorical difference exists between factual or functional works and the more elevated fare of copyright, it is in which party effectively bears the burden of proof on originality. In the usual case, the defendant bears the burden of *disproving* originality; by contrast, in the case of factual and functional works, the plaintiff may bear the burden of *proving* originality.[62]

In some jurisdictions, courts will shift their analysis from authorial creativity or originality to the work's individual character—i.e., its distinctiveness from the existing array of works. Embracing Max Kummer's doctrine of "statistical uniqueness," the Swiss Federal Court has taken the latter approach to the extreme by ruling that it is sufficient that the work itself demonstrate

57. 2009 HCA 14, 2009 WL 1059528 (HCA) (2009).
58. *See, e.g.*, *Inkasso-Programm* ("Collection Program"), German Federal Supreme Court, May 9, 1985, Case No. I ZR 52/83, 17 I.I.C. 681, 688 (1986). *See generally* Schricker 1995, 41.
59. Van Dale v. Romme, Hoge Raad, Jan. 4, 1991 (English trans. *in* Dommering & Hugenholtz 1991, 93). *See also* Cherpillod 1994, 138–142 ("[W]here the creative freedom enjoyed by the author is limited, copyright protection will be granted even if there is only a small degree of creative activity.").
60. Hugenholtz 1996, 169.
61. E.C. Software Directive, Art. 1(3); E.C. Database Directive, Art. 3(1); E.C. Term of Protection Directive, Art. 6. *See* Schricker 1995, 44–45; *see generally* Van Eechoud et al. 2009, 40–43.
62. *See, e.g.*, Fédération Française de Randonnée Pédestre v. Editions Franck Mercier, Court of Cassation, 1st Civil Chamber, June 30, 1998, 178 R.I.D.A. 236 (1998).

individual character: "What is relevant is the individuality of the work, not the individuality of the author."[63]

Art reproductions and restorations present a particularly thorny challenge to the originality requirement. It can require considerable craft, and possibly some art, to recreate a work of fine art exactly. Yet, the greater the craftsman's exactitude, the greater is the distance between his copy and even the most minimal originality standard requiring that the copyright claimant not copy from the original. One court in the United States upheld copyright in a scaled-down reproduction of Auguste Rodin's *Hand of God* on the ground that "great skill and originality" were needed to "produce a scale reduction of a great work with exactitude,"[64] but in another case the court ruled that, while photographic reproductions of two-dimensional art works may be assumed to have entailed "both skill and effort," they nonetheless lacked the required "spark of originality—indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity."[65]

And what of a scholar's painstaking reconstruction and deciphering of lines from the two thousand-year-old Dead Sea Scrolls? In *Eisenman v. Qimron*,[66] the Supreme Court of Israel rejected the alleged infringer's argument that the complainant's work was no more than an uncopyrightable discovery and reconstruction of an existing work, and it ruled that the scholar's work involved "to some extent the arrangement of 'islands' of fragments"; this arrangement, the Court held, "influences the possible meaning of the text, its construction and content, and the way of filling the gaps in it." An examination of the work as a whole revealed "undoubted originality and creativity." The scholar's work was "not technical, or mechanical," and the "additional soul" that he invested in the scroll fragments turned them into a "living text."[67]

§6.1.2 Classes of Subject Matter

The extensive, but not comprehensive, list of the classes of works to be protected under Article 2(1) of the Berne Paris Text[68] and the terser list under

63. Bob Marley, Federal Supreme Court (Bundesgericht) of Switzerland, September 5, 2003, BGE 130 III 168. *See generally* Max Kummer, Das urheberrechtlich schutzbare Werk (1968).
64. Alva Studios, Inc. v. Winninger, 177 F. Supp. 265, 267 (S.D.N.Y. 1959).
65. Bridgeman Art Library Ltd. v. Corel Corp., 36 F. Supp.2d 191, 197 (S.D.N.Y. 1999).
66. C.A. 2790/93, 2811/93 (Supreme Court of Israel 2000).
67. C.A. 2790/93, 2811/93 (Supreme Court of Israel 2000).
68. Berne Convention, 1971 Paris Text Art. 2(1).

Article I[69] of the U.C.C. Paris Text describe only a minimum,[70] and members are free to add new categories of protectible works. At the national level, categorization may have different legal consequences, depending on whether the legislation intends the classes of works to be exhaustive or only illustrative. For instance, while the UK Act offers no copyright protection for subject matter falling outside the eight listed categories, most—but not all[71]—civil law systems generally allow protection of classes of works falling well outside recognized subject matter categories.[72] While this open-endedness allows civil law copyright systems to more easily accommodate novel forms of human creation, it also harbors the possibility of limitless expansion of the domain of copyright.[73]

A case in point are creations that appeal to the sense of smell. The Dutch Supreme Court has held that the fragrance of a perfume qualifies as a "work of literature, science or art," while its French counterpart has excluded fragrance from the domain of copyright, holding that "a perfume fragrance, which is the result of the simple application of know-how, does not constitute the creation of a form of expression . . . capable of benefiting from the protection afforded to intellectual works by copyright."[74] The Dutch Supreme Court has, even more controversially, admitted as works of authorship a system of chemical equations[75] and a series of taped police interviews with a police informer. According to the Court, all that is required for a creation to attract copyright protection is a degree of originality and personal character; no intention to create a work need be shown.[76]

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69. Universal Copyright Convention, 1971 Paris Text Art. I.
70. Berne Convention, 1971 Paris Text Art. 2(6) makes this point explicit by providing that "[t]he works mentioned in this Article shall enjoy protection in all countries of the Union."
71. In contrast to Germany, Austrian copyright law protects only expressly enumerated categories of works; *see* Austria, *METEO-data*, Supreme Court, December 17, 2002, Case 4 Ob 248/02b, [2003] GRUR Int. 863.
72. For example, courts in several countries have granted protection to the wrapping of famous buildings and monuments by artists Christo and Jean Claude. *See, e.g.*, France, Court of Appeals of Paris, March 13, 1986, *cited in* Tanya Aplin, *Subject matter, in* Derclaye 2009, 58; Germany, "Wrapped Reichstag", Federal Supreme Court, January 24, 2002, Case I ZR 102/99, 34 I.I.C. (2003), 570.
73. Tanya Aplin, *Subject matter*, *in* Derclaye 2009, 71–72.
74. Netherlands, Kecofa v. Lancôme, Dutch Supreme Court (Hoge Raad), June 16, 2006, Case C04/327HR, [2006] ECDR 26, *critically discussed* by Herman Cohen Jehoram 28 E.I.P.R. 629 (2006); France, Bsiri-Barbir v. Haarmann & Reimer, Court of Cassation, June 13, 2006, 210 R.I.D.A. 348 (2006). *See* C. Seville, *Copyright in Perfumes: Smelling a Rat*, Cambridge L. J. 66, 49–52 (2007).
75. Netherlands, Technip Benelux BV v. Goossens, Supreme Court, February 24, 2006, 28 I.I.C. 615 (2007).
76. Netherlands, *Endstra Tapes*, Supreme Court, May 30, 2008, [2008] Nederlandse Jurisprudentie 556.

Nonetheless, there is a tendency in all jurisdictions, when extending copyright protection to new forms of subject matter, to assimilate the new forms to existing categories of works. Computer programs, for example, have been widely assimilated to literary works, although the expediency of obtaining international protection for computer programs under the umbrella of the Berne Convention may have played a larger role than did software's inherent similarity to literature.[77] Both the TRIPs Agreement and the WIPO Copyright Treaty characterize computer programs as at least comparable to literary works under the Berne Convention.[78] The Berne categories themselves have been expanded over time to add new classes of subject matter, such as architectural works added by the 1908 Berlin text and cinematographic works added by the 1948 Brussels text.

§6.1.2.1 Literary Works

Courts and legislatures generally give a broad definitional scope to the "books, pamphlets and other writings"[79] specified in the Berne Convention and the "writings"[80] specified in the Universal Copyright Convention. The German Author's Rights Act covers "works of language, such as writings, speeches and computer programs,"[81] and the French Act lists "[b]ooks, pamphlets and other literary, artistic and scientific writings" and "[l]ectures, addresses, sermons, pleadings and other works of such nature."[82] The United Kingdom's 1988 Copyright, Designs and Patents Act protects as literary works "any work, other than a dramatic or musical work, which is written, spoken or sung."[83] The U.S. Copyright Act defines "literary works" as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied."[84]

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77. Ricketson & Ginsburg 2006, para 8.93; *see* §6.1.2.9, below.
78. TRIPs Agreement Art. 10(1); WIPO Copyright Treaty Art. 4. *See generally* §6.1.2.9, below. Where the TRIPs Agreement states that "[c]omputer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)," the WIPO Copyright Treaty states that "[c]omputer programs are protected as literary works within the meaning of Article 2 of the Berne Convention."
79. Berne Convention, 1971 Paris Text Art. 2(1).
80. Universal Copyright Convention, 1971 Paris Text Art. I.
81. Germany, Copyright Act Art. 2(1).
82. France, Intellectual Property Code Art. L 112-2(1), (2).
83. United Kingdom, Copyright, Designs and Patents Act 1988 §3(1). The provision expressly includes in this category "a table or compilation, and (b) a computer program."
84. U.S. 1976 Copyright Act §101. According to the legislative history on the Act, this definition "includes computer data bases and computer programs to the extent that they incorporate

The WIPO *Guide to the Berne Convention* offers the most particularized inventory of literary works protected under the Convention: "novels, news, poems, recitations, short stories whether fictional or not, pamphlets, treatises or handbooks on philosophy, history and all other natural or physical science, almanacs, year books, programmes, guides, etc., etc., irrespective of their contents, their length, their purpose (entertainment, education, information, discussion, advertisement, propaganda, etc.) and their form (manuscript, typescript, printing)."[85]

The principal limits on protectible literary works are qualitative rather than quantitative, and the scope of protection they receive will usually vary with the extent to which the particular genre leaves room for creative expression. Courts generally assume that there is less opportunity for original expression in adaptations and translations,[86] in collective works, such as anthologies,[87] and in utilitarian works, such as instruction manuals or computer programs, than there is in unfettered fiction like novels and stories, and consequently give these works a narrow range of protection.[88] It is commonly said that the title of a literary or other work is not protectible, but this is probably because titles characteristically lack sufficient expressive content to rise above unprotectible ideas.[89] (However, unfair competition protection will often be available where a competitor's use of a work's title confuses consumers as to source.) Similarly, as Professor Gerhard Schricker has observed, "[t]here is no uniform view on the copyrightability of advertising slogans. Mostly, copyright protection is not ruled out *per se*, yet copyright requirements are regarded as difficult to meet because of the brevity of advertising slogans."[90]

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authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves." U.S. House Report, 54.

85. WIPO 1978, 13–14.
86. *See* §6.1.2.6, below.
87. *See* §6.1.2.7, below.
88. *See* §§6.1.2.8, 6.1.2.9, below.
89. *See generally* §6.1.3, below. *See, e.g.*, Rose v. Information Services, Ltd. [Chancery Div. 1987] F.S.R. 254 (*The Lawyer's Diary 1986* insufficiently expressive as title of a lawyer's diary to qualify for copyright); Francis Day & Hunter v. Twentieth Century Fox, 4 ALL E.R. 192 (1939) (holding that the use of the title of a famous song as the title of a motion picture is an insufficient basis for a claim of copyright infringement). In exceptional cases however, courts will find sufficient originality in a title. *See, e.g.*, Portugal, "XEQMAT," Supreme Court of Portugal, January 8, 2009, Case no. 07B3943; and Hungary, "Gloomy Sunday," Supreme Court of Hungary, Case no. BH.1986.14.
90. Schricker 1997, 490–491. ("Some academics have completely ruled out copyrightability. Decisions have mostly denied copyright protection. Copyright protection was rejected for 'Hamburg goes to E.'; 'Ja . . . Jacobi,' and also for 'the most important event of the year.' Two examples where copyright protection was granted were: 'With my Forma bra, feeling smooth as a butterfly in Spring' and 'a heavenly bed in my hand luggage.' According to the normal standards of copyright law, protection for single words would be denied.") (footnotes omitted.)

Copyright law in most countries will protect a literary character if the character is sufficiently delineated.[91]

§6.1.2.2 Musical Works

The Berne Convention category of "musical compositions with or without words"[92] encompasses music in its widest aspect, from advertising jingles to hymns, choruses, and symphonies, whether scored for a single instrument, for several, or for large orchestras.[93] The Berne Paris Text leaves it to local legislation to determine whether fixation should be required as a condition of protection for musical works.[94]

Although some of the older national copyright acts defined protectible music in conventional terms, invoking combinations of melody and harmony, modern legislation generally attempts no qualitative distinctions and embraces any expression of sound. Some countries, such as France and the United States, define protectible musical works to include any accompanying words.[95] Others, like the United Kingdom, define musical works to mean "a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music."[96] The distinction is consequential since, under the British approach, if different authors wrote the music and words, these two elements of a single song would have different terms of copyright (measured by the lives of the different authors)[97] and, possibly, different points of attachment (if determined by the author's nationality or domicile).

§6.1.2.3 Works of Visual Art and Photography

National legislation, at least in Berne countries, gives a broad compass to protectible works of visual art, following the Convention's exhaustive listing: "works

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91. *See, e.g.*, France, de Villiers v. Soton, Court of Cassation, 1st Civil Chamber, May 5, 1993, 158 R.I.D.A. 205 (1993); Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930).
92. Berne Convention, 1971 Paris Text Art. 2(1). *See also* Universal Copyright Convention, 1971 Paris Text Art. I. (musical works).
93. WIPO 1978, 14.

    The legal distinction between musical works and their performance separates the Berne Convention on one side, from the Rome and Geneva Conventions, on the other. *See* §6.2, below. The distinction is frequently arbitrary, most notably in the case of musical arrangements—protected as works under Berne—which may be hard to differentiate from a performer's particular manner of rendering a song, which is protected only as a performance or phonogram outside Berne. The increasingly catholic approach to definition of musical works, particularly in countries that relegate sound recordings to neighboring rights protection, will inevitably threaten the traditional distinction.
94. *See* §6.1.5, below. Fixation, if required, can usually be in written notation or recorded form.
95. France, Intellectual Property Code Art. L. 112-2(5); U.S. 1976 Copyright Act §102(a)(2).
96. United Kingdom, Copyright, Designs and Patents Act 1988 §3(1).
97. *See* §8.1.1 below.

of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."[98] The WIPO *Guide to the Berne Convention* observes that "this category covers virtually all artistic works whether in two dimensions (drawings, engravings, lithographs, etc.) or in three (sculptures, statues, works of architecture, monuments, etc.) independent of their nature (figurative or abstract) and their intention (pure or commercial art)."[99]

As with protectible subject matter generally, courts normally do not require works of visual art to meet any aesthetic standard, requiring only that the work originate with its putative author and bear the stamp of his personality. Section 4(1) of the 1988 British Act defines "artistic work" to include "a graphic work, photograph, sculpture or collage, irrespective of artistic quality."[100] Courts applying the traditional copyright distinction between idea and expression will withhold protection from such fundamental building blocks in visual art as color, perspective, geometric shape, and standard arrangements dictated by aesthetic convention but will protect the artist's combination of these elements into the work's expression.[101]

Product labels, and even trademarks, obtain protection in many countries,[102] as do advertisements, fabric designs, and catalogue illustrations. Cartoon figures, such as the popular French character *Asterix*, will, if sufficiently delineated, be protected, and not only in the individual poses in which

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98. Berne Convention, 1971 Paris Text Art. 2(1). The Universal Copyright Convention, 1971 Paris Text Art. I, is more sparing in listing as examples, "paintings, engravings and sculpture." Nonetheless, as Dr. Bogsch has observed, "[t]hese words should be broadly interpreted, as far as the technique is concerned. Thus 'painting' probably includes also drawings, and 'engravings' also include lithographs." Bogsch 1968, 9.
99. WIPO 1978, 16.
100. United Kingdom, Copyright, Designs and Patents Act 1988 §4(1)(a). The other two classes of artistic works—works of architecture and works of artistic craftsmanship—are not expressly made "irrespective of artistic quality."
101. *See, e.g.*, Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1075–1077 (2d Cir. 1992) (plaintiff's sequencing of "ego fixation" labels lacked originality because it was functionally dictated; however, attachment of labels to geometric figures contained "the minimal degree of creativity to make it copyrightable.").
102. *See, e.g.*, DRG Inc. v. Datafile Ltd. (1987) 18 C.P.R. (3d) 538, 545–6, 27 C.I.P.R. 136 (Fed.Ct.), *aff'd* (1991) [117 N.R. 308], 35 C.P.R. (3d) 243 (Fed. C.A.) (holding that color-coded file folder labels are not disqualified from copyright protection because of their functional purpose); Motel 6, Inc. v. No. 6 Motel Ltd. (1981) 127 D.L.R. (3d) 267, 56 C.P.R. (2d) 44, 54 (Fed. Ct.) (holding that the Motel 6 trademark is protected under Canadian law against copyright infringement); Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) (circus posters); Novelty Textile Mills, Inc. v. Joan Fabrics Corp. 558 F.2d 1090 (2d Cir. 1977) (fabric designs).

they are depicted, but in any pose in which the infringer places them.[103] In this respect, copyright in visually depicted characters probably confers a wider range of protection than copyright in other forms of pictorial, graphic, and sculptural works. Unlike paintings, photographs, or novelty items, a character can take on a life of its own and copyright will protect the character against copies in postures, settings, and attitudes far removed from any of the author's original depictions.

If courts do not impose aesthetic standards on works of visual art, they will nonetheless conform the scope of protection for these works to the constraints on originality inherent in a particular genre. Maps, for example, will be protected only to the extent of the cartographer's original contributions to the underlying facts.[104] Protection for technical drawings will be limited by technological or scientific imperative.[105] Courts or legislators in some countries further limit protection for technical and design drawings to reproductions in two-dimensional format, giving no protection against three-dimensional constructions made from the drawings;[106] protection against three-dimensional renderings will be given in these countries only to the extent that the drawing qualifies as plans for an architectural work.

Works of architecture and applied art will, to the extent they embody utilitarian design, encounter stringent limits on protection.[107] Amendments to the U.S. Copyright Act in 1990, extending protection to architectural works,[108] included protection for "the overall form as well as the arrangement and composition of spaces and elements in the design" but excluded protection for "individual standard features."[109]

Photographs receive more varied copyright treatment from country to country than any other form of subject matter, with the possible exception of industrial design. The Universal Copyright Convention does not require member countries to protect photographs.[110] The Berne Paris Text, though it requires protection for photographs, gives member countries considerable

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103. *Alcolix*, German Federal Supreme Court, March 11, 1993 (Case No. I ZR 263(91)) 25 I.I.C. 605, 607 (1994). *See also* Portugal, *Asterix,* Supreme Court, July 7, 1999, 32 I.I.C. 96.
104. *See, e.g.*, Fédération Française de Randonnée Pédestre v. Editions Franck Mercier, Court of Cassation, 1st Civil Chamber, June 30, 1998, 178 R.I.D.A. 236 (1998); United States v. Hamilton, 583 F.2d 448 (9th Cir. 1978).
105. *See, e.g.*, *Elektrodenfabrik* ("Electrode Factory"), German Federal Supreme Court, May 10, 1984, Case No. I ZR 85/82, 17 I.I.C. 430 (1986); Baker v. Selden, 101 U.S. 99, 107 (1879).
106. *See, e.g.*, *Elektrodenfabrik* ("Electrode Factory"), German Federal Supreme Court, May 10, 1984, Case No. I ZR 85/82, 17 I.I.C. 430 (1986). *See also* U.S 1976 Copyright Act §113(b).
107. *See* §6.1.2.10, below.
108. Pub. L. No. 101-650, tit. vii, 104 Stat. 5133 (Dec. 1, 1990).
109. U.S. 1976 Copyright Act §101.
110. The Universal Copyright Convention, 1971 Paris Text Art. IV(3) does, however, provide that if a member country protects photographic works, the term of protection must not be less than ten years.

latitude in setting the term of protection for "photographic works to which are assimilated works expressed by a process analogous to photography."[111] Variations in the Berne Convention's treatment of photographs from one Berne text to another, and in the national responses to these changes, require care in determining whether a photograph produced or published at a particular time was covered under the then-applicable law of the protecting country.

Professor Gunnar Karnell has observed that "[t]here is room for a wide variety of different approaches to the issue of photography protection under national copyright rules, and such a great variety does indeed exist."[112] The most prominent points of difference in national treatment of photographs are in length of copyright term and in the requirement of artistic content, imposed by some countries. A study of 44 countries revealed twenty different terms of protection.[113] While most countries impose a single originality standard on all photographs, some, such as Germany, impose a standard of intellectual creativity for copyright protection of photographic works[114] and a looser standard for neighboring rights protection of simple photographs such as snapshots.[115] Within the European Union, the Term of Protection Directive[116] has introduced some measure of uniformity not only in providing for a harmonized term of copyright protection for photographic works,[117] but also in predicating a uniform standard that holds a photographic work "within the meaning of the Berne Convention" to be original "if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account."[118] Arguably, this wording implies a stricter test than is laid down elsewhere in the E.C. Software and Database Directives.[119]

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111. Berne Convention, 1971 Paris Text Art. 2(1).
112. Karnell 1988, 134. *See also* S. Byrne, *Photography and the Law of Copyright*, 20 I.I.C. 37 (1989); Copyright and Photographs: An International Survey (Ysolde Gendreau, Axel Nordemann and Rainer Oesch eds., 1999).
113. Karnell 1988, 135.
114. Germany, Copyright Act Art 2(1)(5). *See also* Spain, Copyright Act Art. 10(1)(h).
115. Germany, Copyright Act Art. 72. *See also* Spain, Copyright Act Art. 118. *See generally* Adolf Dietz, *Letter from the Federal Republic of Germany (1)*, 26 Copyright 58, 73–74 (1990).
116. Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 ("Term of Protection Directive"), OJ No. L 372/12, December 27, 2006.
117. E.C. Term of Protection Directive Art. 6. *See* §8.1.2.2, below.
118. E.C. Term of Protection Directive Recital 16. According to the Recital and Article 6, member states may also provide for the protection of other photographs not meeting this standard.
119. *See* Gunnar Karnell, *European Originality: A Copyright Chimera*, *in* Kabel & Mom 1998, 203.

§6.1.2.4 Dramatic Works

Both the Berne Convention and the Universal Copyright Convention specify "dramatic works" as a required subject matter category,[120] with the Berne Convention annexing "dramatico-musical works" to this class. The category, which appeared in the earliest texts of both treaties, clearly encompasses traditional theatrical works, such as plays, operas, and musical comedies. National legislation has given the category an expansive scope. The British legislation, for example, provides that "'dramatic work' includes a work of dance or mime,"[121] while the French statute tracks Berne by providing for "[d]ramatic or [d]ramatico-musical works,"[122] and the German Act presumably includes this class of works in "works of language" and "works of pantomime."[123] The U.S. Copyright Act protects "dramatic works, including any accompanying music."[124] Although the U.S. Act does not define the term, judicial decisions in the United States have defined "dramatic work" to require a story consisting of plot and incident in which the actions of the characters advance the narrative.[125]

Choreography and pantomime, though assigned a separate category in the Berne text,[126] are sometimes grouped with dramatic works under national legislation. The 1908 Berlin Text, which introduced the category, included a requirement that the choreographic work or pantomime be "fixed in writing or otherwise,"[127] a requirement that was not dropped until the 1967 Stockholm Revision, which left it to national legislation to determine whether any class of work has to be fixed as a condition to protection.[128] The 1976 U.S. Copyright Act includes "pantomimes and choreographic works" as a separate class of copyrightable subject matter and subjects them to a fixation requirement as it does all other forms of copyright subject matter.[129] Judicial decisions under earlier copyright acts had at least suggested that pantomimes

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120. Berne Convention, 1971 Paris Text Art. 2(1); Universal Copyright Convention, 1971 Paris Text Art. I.
121. United Kingdom, Copyright, Designs and Patents Act 1988 §3(1).
122. France, Intellectual Property Code Art. L. 112-2(3).
123. Germany, Copyright Act Art. 2(1)(1),(3).
124. U.S. 1976 Copyright Act §102(a)(3).
125. *See, e.g.*, Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 359 (9th Cir. 1947); Seltzer v. Sunbrock, 22 F. Supp. 621, 628–629 (S.D. Cal. 1938) ("The courts, in determining what constitutes a dramatic composition, have emphatically stated that there must be a story—a thread of consecutively related events—either narrated or presented by dialogue or action or both.").
126. Berne Convention, 1971 Paris Text Art. 2(1).
127. Berne Convention, 1908 Berlin Text Art. (2)(1).
128. *See* §6.1.5, below.
129. U.S. 1976 Copyright Act §102(a)(4).

and choreographic works could qualify as dramatic works if they possessed sufficient dramatic content.[130]

§6.1.2.5 Cinematographic Works

"Cinematographic works," to which Article 2(1) of the Berne Convention assimilates "works expressed by a process analogous to cinematography," include filmed or videotaped fixations of traditional dramatic works such as plays and musical comedies, but also, according to the WIPO *Berne Convention Guide*, encompass all possible forms of filmed content, from documentary films to cartoons, regardless of the technical process employed.[131]

The WIPO Guide's expansive construction of "cinematographic works" accurately characterizes the scope given to cinematographic works in most, if not all, countries. The United Kingdom Copyright, Designs and Patents Act defines "film" to mean "a recording on any medium from which a moving image may by any means be produced" and includes the sound track accompanying the film.[132] The U.S. Copyright Act broadly protects "motion pictures and other audiovisual works,"[133] requiring only that the work "consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied."[134]

The boundaries indicated by the WIPO Guide may, however, exceed the width of this category in other countries.[135] Just as some civil law countries resisted bringing photographs and other mechanical productions under their author's right legislation, some civil law countries have only tentatively accepted motion pictures into the domain of literary works and even

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130. *See, e.g.*, Kalem Co. v. Harper Bros., 222 U.S. 55, 61 (1911); Fuller v. Bemis, 50 F. 926 (C.C.S.D.N.Y. 1892).
131. WIPO 1978, 15. *See also* Bogsch 1968, 9 ("Silent or sound motion pictures shall be protected irrespective of their destination (theatrical exhibition, television broadcasting, exhibition for a restricted group of spectators), the person of their producers (producers of commercial films, amateurs, broadcasting organizations producing kinescopes), their genre (film dramas, documentaries, news-reels, etc.), length, mode of realization (filming of 'nature,' cartoons) or technical process used (pictures on transparent films, on electronic tapes, etc.)").
132. United Kingdom, Copyright, Designs and Patents Act 1988 §5B.
133. U.S. 1976 Copyright Act §102(a)(6).
134. U.S. 1976 Copyright Act §101. Section 101 defines "motion pictures" as "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any."
135. *See, e.g.*, Pascal Kamina, *Authorship of Films and Implementation of the Term Directive: The Dramatic Tale of Two Copyrights*, 16 E.I.P.R. 319 (1994).

today may protect them only incompletely.[136] Nonetheless, the category of motion pictures has received an expansive definition in such important centers of film production as France[137] and Germany.[138] In France, motion pictures are categorized as "audiovisual works,"[139] a notion broad enough in principle, although perhaps not in practice, to encompass a wide range of audiovisual subject matter, including computer games and websites with video content.[140]

§6.1.2.6 Translations, Adaptations, and Other Derivative Works

Article 2(3) of the Berne Convention provides that "[t]ranslations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work." Article L. 112-3 of the French Intellectual Property Code includes "translations, adaptations, transformations or arrangements of works of the mind" as copyrightable subject matter. The German Act provides for the protection of "[t]ranslations and other adaptations of a work which constitute personal intellectual creations of the adapter."[141] The British Act assimilates the full range of derivative works into its basic protection of literary, dramatic, musical, and artistic works,[142] and the U.S. Act extends protection to derivative works,[143]defining "derivative work" as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed or adapted."[144]

Courts characteristically apply the same originality standard to derivative works that they do to literary and artistic works generally and subject them to the same constraints. For example, just as a fictional work will enjoy a comparatively wide scope of protection, so will a translation of that work; however, just as a technical manual will obtain a narrow scope of protection, so

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136. Ricketson 1987, 555–558.
137. *See* France, Intellectual Property Code Art. L. 112-2(6).
138. *See, e.g.*, *Filmregisseur* ("Film Director"), German Federal Supreme Court, Nov. 24, 1983, Case I ZR 147/81, 16 I.I.C. 119 (1985). *See also* Spain, Copyright Act Art. 86(1).
139. France, Intellectual Property Code Art. L. 112-2(6).
140. *See* Pascal Kamina, *The subject-matter for film production in Europe*, *in* Derclaye 2009, 94.
141. Germany, Copyright Act Art 3. The German Act expressly excludes protection for "[i]nsignificant adaptations of a non-protected musical work." *Id*.
142. *See* Skone James et al. 1991, 3-33 through 3-43; Cornish 1996, 332–41.
143. U.S. 1976 Copyright Act §103(a).
144. U.S. 1976 Copyright Act §101. "A work consisting of editorial revisions, annotations, elaborations or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" *Id*.

will a translation of the manual that requires the same degree of functional precision. Courts in both France and the United States have found the required originality in art reproductions that reflected, even to a modest degree, the impress of the adapter's personality.[145]

The phrase in Berne Article 2(3) "without prejudice to the copyright in the original work" opens a significant ambiguity about the legal status of a derivative work created without permission from the copyright owner of the underlying work. It is clear, as the WIPO *Guide to the Berne Convention* observes, that unless the underlying work is in the public domain, the author's consent is needed to translate, adapt, arrange, or otherwise alter the work.[146] But the phrase does not indicate whether use of the underlying copyrighted material without authority not only subjects the derivative work's creator to suit by the copyright owner for infringement of the derivative right in the underlying work, but also deprives the derivative work of copyright.[147] The U.S. Copyright Act expressly provides that, in the case of both derivative works and compilations, "protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully."[148] Courts in the United Kingdom take the opposite approach and will uphold copyright in a work that infringes copyright in the underlying work so long as the derivative work contributes new expression to it.[149] In most civil law jurisdictions, creating a derivative work without permission of the owner of the underlying work probably would be permitted under statutory exemptions allowing reproduction and adaptation for personal use.

§6.1.2.7 Compilations and Collective Works, Including Databases

Article 2(5) of the Berne Paris Text provides that "[c]ollections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations

145. *See, e.g.*, Gieules v. Sagne Court of Cassation, I Civil Chamber, Nov. 9, 1993, 161 R.I.D.A. 273 (1994); Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc. 191 F.2d. 99 (2d Cir. 1951).

146. WIPO 1978. On derivative rights generally, see §9.1.3, below.

147. *See generally* David Vaver, *Translation and Copyright: A Canadian Focus*, 16 E.I.P.R. 159, 161 (1994); David Vaver, *Abridgments and Abstracts: Copyright Implications*, 17 E.I.P.R. 225, 229 (1995).

148. U.S., 1976 Copyright Act §103(a).

149. *See, e.g.*, Redwood Music Ltd. v. Chappell & Co. Ltd., [Q.B. 1982] R.P.C. 109, 120. ("It is understandable that the owner of a copyright should be entitled to restrain publication of an infringing work; but the idea that he should be entitled to reap the benefit of another's original work, by exploiting it, however extensive such work might be, however innocently it might have been made, offends against justice and commonsense.") *See generally* Skone James et al. 1991, 3–44 through 3–48.

shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections."[150]

The category created by Article 2(5) is confined to works that, like encyclopedias and anthologies, are collections of preexisting works. National legislation on compilations sometimes follows this formulation. The French legislation, for example, lists "anthologies or collections of various works." The WIPO Copyright Treaty and the TRIPs Agreement, more broadly, require protection for "[c]ompilations of data or other material" which "by reason of the selection or arrangement of their contents constitute intellectual creations."[151] This language, which is repeated in French and German legislation,[152] would include collections of uncopyrightable data—restaurant guides and almanacs, for example,—as well as compilations of literary and artistic works. It is unclear whether these newer formulations represent an expansion over Berne Article 2 as a whole, and not just over Article 2(5), since "literary works" in Article 2(1) may be read broadly to encompass compilations of data. The formulations for compilations employed in the WIPO Copyright Treaty and the TRIPs Agreement are sufficiently broad to include electronic databases. The E.C. Database Directive's encompassing definition of a "database" protectible by copyright—"a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means"[153]—leaves no doubt that, although computerized electronic databases may have been the occasion for promulgating the Database Directive, all compilations, whether in book or other manual form, come within its scope.[154] The Directive also provides for the protection of the collected data themselves through a second, noncopyright regime.[155]

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150. Berne Convention, 1971 Paris Text 2(5).
151. WIPO Copyright Treaty Art. 5 ("Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation."); TRIPs Agreement Art. 10. ("Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or the material itself, shall be without prejudice to any copyright subsisting in the data or material itself.")
152. France, Intellectual Property Code Art. L. 112-3; Germany, Copyright Act Art. 4.
153. Council Directive 96/9 EC ("Database Directive"), March 11, 1996, OJ L 977, Art. 1(2).
154. Differences in coverage between the Database Directive, the Berne Convention, and preexisting national laws inside the European Union complicate coordination of protection as the Directive is implemented locally. *See* Simon Chalton, *The Effect of the E.C. Database Directive on United Kingdom Copyright Law in Relation to Databases: A Comparison of Features*, 19 E.I.P.R. 278, 281 (1997).
155. *See* §6.2.4, below.

The generally encompassing definitions given to compilations in common law countries offer ample latitude for protection of databases and, indeed, any collections of data that meet the required standard of originality. The Canadian Copyright Act, for example, defines a compilation as "a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof," or "a work resulting from the selection or arrangement of data."[156] The U.S. Copyright Act defines a "compilation" as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[157] Section 101 of the Act includes in this category "collective works," defined as "work[s], such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."[158]

The seminal standard of originality for compilations is the requirement prescribed by Article 2(5) of the Berne Convention that the "selection and arrangement" of the contents constitute an "intellectual creation." The WIPO *Guide to the Berne Convention* explains that the "maker must bring to bear an element of creativity; merely listing the works or extracts without offering any personal contribution is not enough."[159] This standard has been applied by member countries with varying degrees of strictness.[160]

While continental European courts tend to require a clear showing of individual intellectual creativity,[161] British courts traditionally impose virtually no standard at all beyond the contribution of "skill, judgment, labour and learning."[162] The United States, though a latecomer to the Berne Union, has

156. Canada, Copyright Act §2.
157. U.S. 1976 Copyright Act §101.
158. U.S. 1976 Copyright Act §101.
159. WIPO 1978, 20.
160. *Compare* Switzerland, "Compendium of pharmaceuticals", Federal Court, February 13, 2008, Case no. BGE 134 III 166 (no copyright protection for compendium of pharmaceuticals for lack of "individuality" because of legal requirements applying to the information contained, the information's limited, specific purpose, general use of medical language, and the compendium's intrinsic logic) *with* Germany, "Trademark lexicon", Federal Supreme Court, March 12, 1987, Case no. I ZR 71/85, [1987] GRUR 704 (trademark lexicon considered intellectual creation for reason of creative selection and arrangement).
161. Van Dale v. Romme, Hoge Raad, January 4, 1991 (English trans. *in* Dommering & Hugenholtz 1991, 93).
162. *See, e.g.*, Macmillan & Co. Ltd. v. Cooper [1923] 40 T.L.R. 186, 188 (1924); Independent Television Publications Ltd. v. Time Out Ltd., [Ch. Div. 1984] F.S.R. 64. Arguably, pursuant to Art. 3(1) of the E.C. Database Directive British courts are required to apply the more elevated standard of "the author's own creation" in respect of databases. *See* §6.1.2.7, below.

through its Supreme Court adopted a standard comparable to the creativity standard adopted under the Convention.[163]

The European Database Directive provides that "databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection."[164] The requirement that a copyrightable database "constitute the author's own intellectual creation" deriving from acts of selection or arrangement represents both a ceiling and a floor, and it has obligated some European Union countries, like the United Kingdom, to raise their originality standard for this class of works, and other countries, like Germany, to lower their standard.[165]

§6.1.2.8 Utilitarian Works

National legislatures and courts have shown little reluctance to bring utilitarian works containing some expressive elements, such as texts, engineering manuals, and recipe books, into the company of novels, essays, and poetry under the rubric of literary works. A decision of the German Federal Supreme Court involving illustrated operating instructions for a power saw typifies the conditions on which courts will extend copyright to essentially utilitarian productions. The court there agreed with the lower court that copyright protection had to depend on the presence of some measure of creativity rising above mere technical proficiency, but it ruled that the lower court had failed to account for the creative possibilities presented by the manual's integration of text with the selection and arrangement of complementing illustrations.[166]

In the United States, an 1879 decision of the Supreme Court dealing with a claim of copyright in a bookkeeping text continues to provide the operative principle for functional works. In the Court's view, if the art the book teaches "cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the

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163. *See* Feist Publications, Inc. v. Rural Telephone Service, Co. Inc., 499 U.S. 340 (1991).
164. E.C. Database Directive Art. 3(1). Further, the "copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves." E.C. Database Directive Art. 3(2).
165. *See* Michael Lehmann, *The European Database Directive and its Implementation into German Law*, 29 I.I.C. 776, 781–82 (1998).
166. *Bedienungsanweisung* ("Operating Instructions"), German Federal Supreme Court, Oct. 10, 1991, Case No. I ZR 147/89, 23 I.I.C. 846, 851 (1992). *See also* Shinto Teramoto, *Copyrightability and Scope of Protection for Works of Utilitarian Nature Under Japanese Law*, 28 I.I.C. 51, 74 (1997) (noting that Japanese copyright law determines copyrightability through factors such as the "'degree to which expression in a work is restricted by utilitarian function'").

public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application."[167]

§6.1.2.9 Computer Programs

Computer programs, which are quintessentially utilitarian works, early on faced distinctive obstacles to inclusion in the general class of literary works. One hurdle was that programs are generally written in source code, which is difficult for humans to apprehend, or in object code, which is impossible for humans to apprehend. Another hurdle was that programs are regularly embodied in digital media such as disks and silicon chips. By the mid-1980s, however, most major industrial nations had resolved these issues and brought computer programs into the realm of literary works. Most countries in the world today protect computer programs as literary works, a trend no doubt supported by a provision in the TRIPs Agreement that "[c]omputer programs, whether in source or object code, shall be protected as literary works under the Berne Convention"[168] and in the WIPO Copyright Treaty that "[c]omputer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression."[169]

Copyright legislation in a handful of countries expressly defines computer programs. The Japanese Copyright Act, amended in 1985 to extend copyright to computer software, defines a computer program (*Puroguramu*) as "an expression of combined instructions given to a computer so as to make it function and obtain a certain result."[170] The U.S. Copyright Act defines "computer program" as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."[171] The legislation in the United Kingdom, which, like most copyright legislation, protects computer programs but does not define them, also extends copyright protection to traditional works, such as drawings, stories, and songs, that are generated by programmed computers.[172] Since such works will often lack a human author, the legislation provides that, in these cases, the author for purposes of copyright is "the person by whom the arrangements necessary for the creation of the work are undertaken."[173]

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167. Baker v. Selden, 101 U.S. 99, 103 (1879).
168. TRIPs Agreement Art. 10(1).
169. WIPO Copyright Treaty Art. 4.
170. Japan, Copyright Act Art. 2(1)(X*bis*). *See generally* Teruo Doi, *Chronique du Japon*, 167 R.I.D.A. 103, 147–53 (1996).
171. U.S. 1976 Copyright Act §101.
172. United Kingdom, Copyright, Designs and Patents Act 1988 §178 (definition of "computer-generated" in relation to a work).
173. United Kingdom, Copyright, Designs and Patents Act 1988 §9(3).

With these threshold issues of classification and definition resolved, courts continue to grapple with the problem of defining the standards and scope of protectible subject matter in computer programs. At one time, the German Federal Supreme Court effectively imposed a patent-like inventiveness standard on computer programs, requiring a level of creativity exceeding that of the "average programmer."[174]

Implementation of the 1991 E.C. Software Directive,[175] which sought to harmonize copyright protection for computer programs throughout the European Union, effectively required the German legislator to lower this standard.[176] In a direct rejection of the German qualitative standard of inventiveness, Article 1(3) provides that "[a] computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection."[177] Case law in Germany has since confirmed the applicability of the lowered standard.[178] Implementation of the Directive in the Netherlands has effectively raised the standard of originality by excluding computer programs from the legislative category of non-original writings.[179] The standard adopted by the Directive has also influenced courts outside the European Union.[180]

Article 1(1) of the E.C. Software Directive requires member states to "protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works."[181] Article 1(2) attempts no precise separation of functional from nonfunctional elements in computer programs, relying instead on the general idea-expression distinction: "[p]rotection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive."[182]

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174. *See Inkasso-Programm* ("Collection Program"), German Federal Supreme Court, May 9, 1985 (Case No. I ZR 52/83), 17 I.I.C. 681, 688 (1986).
175. *See* European Commission, Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs, Brussels, April 10, 2000, COM(2000) 199 final. Council Directive 91/250/ EEC has been repealed and is now replaced by Directive 2009/24/EC (Software Directive).
176. *See* Andreas Raubenheimer, *Implementation of the EC Software Directive in Germany—Special Provisions for Protection of Computer Programs*, 27 I.I.C. 609, 617–618 (1996). *See generally* Lehmann & Tapper 1993; Czarnota & Hart 1991.
177. E.C. Software Directive Art. 1(3). *See* §6.1.1, above.
178. *Buchhaltungsprogramm* ("Accounting Program"), German Federal Supreme Court, July 14, 1993, Case No. I ZR 47/91, 26 I.I.C. 127 (1995).
179. *See* Hugenholtz 1996, 157. On Dutch protection for nonoriginal writings, see §6.1.1, above.
180. *See, e.g.*, Cherpillod 1994, 144.
181. E.C. Software Directive Art. 1(1).
182. E.C. Software Directive Art. 1(2).

The Directive's specific reference to ideas and principles underlying a program's interfaces reflects the desire to exclude any possibility that computer interface specifications would come within copyright control and compromise interoperability of computer programs and equipment. Outside the European Union, some countries rely on the traditional idea-expression distinction to define the scope of protectible subject matter in computer programs, while others, such as Japan, have specifically legislated on the question.[183]

§6.1.2.10 Applied Art and Industrial Design

Works of applied art and industrial design rival only photographic works[184] in the multiplicity of their treatment under national legislation. One reason for the proliferation of conflicting approaches is that applied art and industrial design encompass a continuum from mass novelty items, such as earrings and toys, to works of industrial design, such as chairs and lamps, in which art and function intertwine. Another reason for the diversity is that the different national approaches emerged in the early part of the nineteenth century and consequently were well entrenched by the time the Berne Convention was first conceived.[185]

National approaches to the protection of applied art and industrial design roughly divide into three categories: the *cumulative* or *unity of art* approach, which brings under copyright all works of visual art, whatever their content or application, and makes copyright protection cumulative with the protection given under any independent design protection law; the *partial cumulative* approach, which gives these works copyright protection but subjects them to a higher-than-usual creativity standard; and the *noncumulative* or *duality of art* approach, which excludes industrial designs from copyright and remits them exclusively to the applicable special design protection statute.[186] These three categories are by no means impermeable and are not always internally consistent; national differences within categories will sometimes be as great as the differences between the categories themselves.

France is the most prominent exponent of the unity of art approach. The French Act nominally encompasses "all works of the mind, whatever their kind, form of expression, merit or purpose"[187] and will in theory protect a salt

183. Japan, Copyright Act Art 10(3)("[P]rotection . . . shall not extend to any programming language, rule or algorithm used to make such [program] works.")

184. *See* §6.1.2.3, above.

185. *See generally* Ricketson 1987, 267–269.

186. For a particularly insightful analysis of these approaches, see Reichman 1983; J.H. Reichman, *Design Protection After the Copyright Act of 1976: A Comparative View of the Emerging Interim Models*, 31 J. Copr. Soc'y 267 (1983).

187. France, Intellectual Property Code Art. L. 112-1.

shaker no less than a Brancusi sculpture.[188] In fact, the French legislation is not quite as embracing as the "unity of art" notion might suggest and, much like the noncumulative approach, rejects copyright protection for strictly functional elements of works of applied art. Consequently, while the unity of art theory in France will not draw the line of copyright to exclude mass-produced articles of artistic craftsmanship, it will deny copyright to a design if the article's form and its function are inseparable, as for example when the design of a salt shaker, however elegant, was dictated by its function.[189] Nevertheless, the practical consequence of the unity of art theory is that, if the design is not strictly functional, then the work will be protected by copyright in the same way as any other, with no higher threshold being demanded.

Germany, the most prominent adherent to the partial cumulation approach, expressly includes works of applied art among its categories of protected subject matter,[190] and German courts have upheld copyright protection for industrial objects such as an aesthetically pleasing chair design.[191] The object must, however, pass a higher-than-usual originality standard and clearly surpass works of average design.[192] Nonetheless, German courts may attach a presumption of originality to some forms of industrial design that they do not to others. Professor Dietz has, for example, traced a line of German decisions indulging a generous standard for furniture design, particularly chairs.[193]

The noncumulative approach was traditionally associated with Italy, until this country was obliged to change its law in accordance with the E.C. Design Protection Directive of 1998, which requires cumulation.[194] Previously, the Italian Act extended copyright protection to works of applied art only "if their artistic value is distinct from the industrial character of the product with

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188. *See* Court of Cassation, Decision of May 2, [1961] JCP II 12.242, *cited in* Ginsburg 1989, 273. *See also* Jaap Spoor, *The Impact of Copyright on Benelux Design Protection Law*, *in* Kabel & Mom 1998, 59.
189. *See, e.g.*, Thermopac & Borne v. Seprosy, Court of Cassation, Civ. I, March 28, 1995, 165 R.I.D.A. 326 (1995) (egg box); Arum v. Claire & Troyenne, Court of Cassation, Comm., Fin., & Econ. Div. March 21, 1995, 166 R.I.D.A. 278 (1995) (coat design).
190. Germany, Copyright Act Art. 2(1)(4).
191. *See, e.g.*, "Lounge Chair," Germany, Court of Appeals, Frankfurt, March 19, 1981, Case No. 6 U 160/79, 13 I.I.C. 777 (1982) (copyright protection for Eames lounge chair).
192. *See, e.g.*, *Silberdistel* ("Silver Thistle"), German Federal Supreme Court, June 22, 1995, Case No. I ZR 119/93, 28 I.I.C. 140 (1997) (lower court's findings insufficient to support level of creativity necessary for copyright protection for work of applied art). *See generally* Schricker 1995, 42.
193. *See* Adolf Dietz, *Copyright Law Developments in Germany from 1993 to Mid-1997 (I)*, 175 R.I.D.A. 96, 188–90 (1998); Adolf Dietz, *Copyright Law Developments in the Federal Republic of Germany (from 1989 to the beginning of 1993)*, 157 R.I.D.A. 128, 186–88 (1993).
194. *See* §6.1.2.10, below.

which they are associated."[195] The U.S. Copyright Act approximates this approach to industrial design, withholding protection from utilitarian elements of industrial design by defining protectible "pictorial, graphic, and sculptural works" to include "works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned," and by providing, further, that the design of a useful article "shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[196]

Courts in the United States divide over the manner in which an artistic feature must be separable from the article's utilitarian aspects in order to qualify for copyright. Some courts require the artistic features to be physically separable; an example would be a simulated antique telephone used as a removable casing for a pencil sharpener.[197] Other courts allow conceptual as well as physical separability; an example would be a heavily ornamented belt buckle in which the sculptural features incorporated in the buckle's design can stand on their own as a work of art traditionally conceived and the buckle would be equally useful without it.[198]

The 1988 Copyright, Designs and Patents Act in the United Kingdom parallels the approach taken by the U.S. Copyright Act in some respects. Copyright protection under the British Act pivots on section 51, which provides that it does not constitute infringement to produce an article based on a "design document or model" embodying a design "for anything other than an artistic work or a typeface."[199] The Act defines "design" for these purposes as "the design of any aspect of the shape or configuration (whether internal

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195. Italy, former Copyright Act Art. 2(4) (revoked).
See generally Reichman 1983, 1161 and 1169.

196. U.S. 1976 Copyright Act §101. Section 101 defines "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or convey information," and adds, "[a]n article that is normally part of a useful article is considered a 'useful article.'"

197. *See* Ted Arnold Ltd. v. Silvercraft Co., 259 F. Supp. 733 (S.D.N.Y. 1966). *See also* Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C.Cir. 1978).

198. *See* Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980). *See generally* Goldstein 2005, §2.5.3.

199. Professor Cornish has observed, "Under the 1988 Act, as before, copyright in a drawing arises irrespective of artistic quality, provided that there is sufficient labour, skill and judgment to give originality. It may be infringed by reproducing it in a three-dimensional article; and it matters not whether the act of copying is direct or indirect. The main object of section 51 is accordingly to limit the application of that principle, by cutting out the application of copyright to industrial products which are not themselves capable of being the subject of copyright. It accordingly states that the act of making an article from a "design document or model" which records or embodies a design cannot after all constitute infringement." Cornish 1996, 495 (footnote omitted).

or external) of the whole or part of an article, other than surface decoration."[200] Like the U.S. Act, the British Act permits protection for physically separable ornamentation; unlike the U.S. Act, it would deny protection to conceptually separable, internal or external design features.

The Paris Text of the Berne Convention includes works of applied art among Article 2(1)'s classes of protected works[201] and, in Article 2(7), coordinates the obligations of member countries following any one of the three approaches to this subject matter:

> Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.[202]

The 1967 Stockholm Revision added the last clause, requiring a country that lacks a design registration statute to give copyright protection to works of applied art coming from a country that gives them only noncumulative design protection.[203] This might appear to impose an unequal burden on copyright countries, particularly those that take a partial cumulative approach. However, because most countries today have an industrial design statute, the disparity is more apparent than real.[204]

The phrase in Article 2(7) limiting the protecting country's obligations with respect to works "protected in the country of origin solely as designs and models" raises the question whether a protecting country that grants both copyright protection and special protection to works of applied art can deny copyright protection where the work's country of origin would deny copyright protection to the particular work in issue, but not to the general class of applied art to which the work belongs. For example, the U.S. Copyright Act

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200. United Kingdom, Copyright, Designs and Patents Act 1988 §51(3).
201. "[T]he Convention uses this general expression ['works of applied art'] to cover the artistic contributions of the makers of knick-knacks, jewelry, gold and silverware, furniture, wallpaper, ornaments, clothing, etc." WIPO 1978, 16.
202. Berne Convention, 1971 Paris Text Art. 2(7).
203. *See* Ricketson 1987, 279–280.
204. National discretion is constrained in other ways as well. "In fact member countries are not given a completely free hand: they must observe a minimum term of protection for such works of applied art as they protect as artistic works (i.e., by their copyright law). This minimum is twenty-five years from the making of the work (see paragraph (4) of Article 7)." WIPO 1978, 22.

will protect the artistic features of a useful article if, and to the extent that, the features are separable from the article's utilitarian features. Consequently, while copyright law in the United States will protect the design of artistically detailed lamp bases in general, it will deny protection to any lamp base whose artistic features lack the required separability. Will a lamp base that lacks the required separable elements be entitled to copyright protection, or only to design protection, in another Union country?

Although not free of ambiguity, the language of Article 2(7) suggests that the provision should be construed to deny copyright protection only in cases where the country of origin excludes copyright protection to works of applied art generally. Writing about Article 2(5) of the 1948 Brussels Act, which is in this respect identical to Article 2(7) of the Paris Act, Professor Ricketson has observed that "it was only where copyright protection was excluded in country A by reason of the sole application of designs legislation that copyright protection in country B could be refused. Accordingly, if the only restriction of protection in country A was to be found in the jurisprudence of that country, the courts in country B were not entitled to adopt a corresponding reduction in protection."[205]

Practical considerations underlie this conclusion. If Article 2(7)'s reciprocity provisions were to be applied at the level of national jurisprudence rather than at the level of statutory formulation as Ricketson suggests, a court in the protecting country would effectively be required to replicate the fact-finding and deliberative processes of a hypothetical court in the country of origin to determine whether that court would find the design features in issue to be copyrightable. In judicial systems where the court of last resort has not addressed the issue, and where lower courts have interpreted the statutory provisions differently, the court in the protecting country, with no dispositive guidance, would have to choose from competing judicial approaches the one it concludes best represents national law.

Between Member States of the European Union application of the reciprocity provisions of Berne Article 2(7) would constitute unlawful discrimination on the basis of nationality.[206] According to the European Court of Justice, "the right of an author to claim in a Member State the copyright protection afforded by the law of that State may not be subject to a distinguishing criterion based on the country of origin of the work."[207] Moreover, the E.C. Design Protection Directive of 1998 has removed the main disparities between member states in the area of design protection.[208] The Directive clearly rejects

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205. Ricketson 1987, 278–279.
206. E.C. Treaty Art. 12.
207. Tod SPA v. Heyraud, European Court of Justice, June 30, 2005, Case C-28/04.
208. Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, OJ No. L 289/28, October 28, 1998.

the noncumulative approach and instructs member states that a design protected by design right shall also be eligible for copyright protection.[209] However, the Directive leaves to the discretion of member states "the extent to which, and the conditions under which, such a protection is conferred."[210] Therefore, countries like Germany or France can maintain their different thresholds for protection of designs. Italy, on the other hand, was forced to revise its copyright law and has added to the list of protected works industrial designs that display creative character and artistic value.[211] By introducing a requirement of "artistic value," Italy appears to have adopted a partially cumulative approach, under which works of applied art must bear a higher degree of creativity in order to qualify for copyright protection.[212]

§6.1.3 Unprotectible Subject Matter

§6.1.3.1 Ideas, Facts

Every mature copyright system withholds protection from ideas and other building blocks of literary and artistic expression: words and basic plots and themes in the case of literary works; individual notes and common themes in music; color and perspective in visual art. As stated in the TRIPs Agreement, "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."[213] The WIPO Copyright Treaty features similar language.[214] The E.C. Software Directive contains a specific application of the general principle in its provision that protection under the Directive "shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive."[215]

The Berne Convention nowhere categorically bars protection for ideas. Nonetheless, the Convention's requirements of authorship and originality implicitly support such a bar.[216] Article 2(8)'s provision that "[t]he protection of this Convention shall not apply to the news of the day or to miscellaneous

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209. *Id*. Art 17.
210. *Id*. Art 17.
211. Italy, Legislative Decree of 2 February 2001 nr. 95.
212. Italian courts are not unanimous about the precise meaning of "artistic value." *See* Estelle Derclaye, *Are Fashion Designers Better Protected in Continental Europe than in the United Kingdom? A Comparative Analysis of the Recent Case Law in France, Italy and the United Kingdom*, [2010] 13 JWIP 315–365.
213. TRIPs Agreement Art. 9(2). On the origins of this provision, the first express formulation of the idea-expression distinction in an international agreement, *see* Gervais 1998, 78.
214. WIPO Copyright Treaty Art. 2.
215. E.C. Software Directive Art 1(2).
216. *See* WIPO 1978, 12.

facts having the character of mere items of press information" reflects the important maxim that copyright does not protect facts.[217] Similarly, Article 10(2) of the TRIPs Agreement and Article 5 of the WIPO Copyright Treaty underscore that copyright in compilations of data "shall not extend to the data or material itself." Like ideas, news of the day and data compilations may be protected outside copyright under unfair competition law, neighboring rights, or *sui generis* regimes.

Courts in the United States have elaborated two doctrines, merger and *scènes à faire*, that substantively, if not always explicitly, are employed to effectuate the idea-expression distinction in other countries as well. The two doctrines implement the rule that ideas are uncopyrightable by denying copyright to otherwise copyrightable expressions where the underlying idea can be expressed in only one or a limited number of ways.[218] Merger doctrine applies to functional works, such as forms, rules, and computer programs.[219] The *scènes à faire* doctrine applies mainly to fictional works, such as novels and dramas, and withholds protection from such elements as stock incidents or character attributes that are preordained by unprotectible ideas like basic plot or character type.[220]

Television show formats and similar productions straddling the borderline between idea and expression present hard cases. For example, while Dutch courts generally find sufficient expression in elaborated entertainment formats,[221] the German Supreme Court dismissed copyright protection for the format of a French television show on the ground that, although elaborated, it constituted no more than the concept of a series of television programs and, therefore, did not as such qualify as an intellectual creation.[222]

§6.1.3.2 Official Texts

Article 2(4) of the Berne Paris Text provides that "[i]t shall be a matter for legislation in the countries of the Union to determine the protection to be

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217. Berne Convention, 1971 Paris Text Art. 2(8). *See, e.g.*, WIPO 1978, 22–23 ("The rationale of this provision is that the Convention does not set out to protect mere news or miscellaneous facts because such material does not possess the qualifications necessary for it to be considered a work.") *See also* Ricketson 1987, 304.
218. *See* Goldstein 2005, §2.3.2.
219. *See, e.g.*, Morrissey v. Procter & Gamble Co., 379 F.2d 675 (1st Cir. 1967).
220. *See, e.g.*, Reyher v. Children's Television Workshop, 533 F.2d 87, 92, (2d Cir.) ("Where a lost child is the protagonist, there is likely to be a reunion with parents."), *cert. denied*, 429 U.S. 980 (1976); Walker v. Time-Life Films, Inc., 784 F.2d 44, 50, (2d Cir.) (presence of drunks, prostitutes, and abandoned cars was inescapable in the depiction of an economically depressed area of New York City), *cert. denied*, 476 U.S. 1159 (1986).
221. *See, e.g.*, Netherlands, Castaway v. Endemol, Supreme Court, April 14, 2004, Case C02/284HR [2004] AMI172.
222. Germany, "Show Format", Federal Supreme Court, June 26, 2003, Case I ZR 176/01 (format of French television show *L' école des fans* considered unprotected concept).

granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts." The language reflects a division among Union members on this delicate subject.[223] However, the final clause of Article 2(4) of the Paris Text provides that a member cannot deny protection to *non*-official translations of these texts—presumably translations made by private publishers.[224] This rule arguably does not control the vexed question whether copyright can be withheld from texts that, though prepared privately, have received the imprimatur of official action, or from regulatory codes drafted by private groups that have subsequently been enacted into law.[225]

Most countries deny copyright to statutes, judicial opinions, and other official texts, while sometimes reducing the level of copyright protection for other categories of public sector information, such as government reports.[226] The German Copyright Act, for example, withholds protection from "[l]aws, ordinances, official decrees, and notices and also decisions and official grounds of decisions,"[227] and the Japanese Copyright Law withholds protection from the "Constitution and other laws and regulations," official "notifications" and "judgments, decisions, orders and decrees of law courts, as well as rulings and decisions made by administrative organs in proceedings similar to judicial ones."[228] Courts in the United States have long withheld copyright from such legal documents as judicial opinions and legislative enactments. The principle behind the rule is that, in a democracy, laws must be freely available to the public.[229] The U.S. Copyright Act also withholds protection from all forms of otherwise copyrightable works, and not just official documents, if the work was "prepared by an officer or employee of the United States Government as part of that person's official duties."[230]

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223. Berne Convention, 1971 Paris Text Art. 2(4).
224. Berne Convention, 1971 Paris Text Art. 2(4) ("It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to *official* translations of such texts.") (Emphasis added.)
225. *See* Goldstein 2005, §2.5.2. In Germany, a decision by the Federal Court to qualify as official works not protected under the German Act technical (DIN) norms referenced in official guidelines has led to amendment of the German law. *See* "DIN norms" Federal Supreme Court, April 26, 1990, [1990] GRUR 1003–1005. According to the revised statute, official references to privately set technical norms no longer result in the loss of copyright. However, copyright owners must grant licenses to publish norms under equitable conditions. Germany, Copyright Act Art 5(3).
226. For example, Dutch law allows any further uses of works published by public authorities, unless copyright is expressly reserved. Netherlands, Copyright Act Art. 15(b).
227. Germany, Copyright Act Art. 5(1) *See also Leitsätze* ("Headnotes"), German Federal Supreme Court, November 21, 1991, Case No. I ZR 190/89, 24 I.I.C. 668, 675 (1993).
228. Japan, Copyright Act Art. 13.
229. *See, e.g.*, Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 668 (1834); Callaghan v. Myers, 128 U.S. 617, 647 (1888).
230. U.S. 1976 Copyright Act §§101, 105.

A few countries, most notably within the British Commonwealth, use the concepts of Crown and Parliamentary copyright to protect official publications, including government reports and legislation, usually subject to generous provision for free use.[231] Noting that "Crown copyright under the 1988 Act arises where a work is made by an officer or servant of the Crown in the course of his duties" and that "Parliamentary copyright is, in the main, given to whichever House has, by its direction or control, had the work made; or to both, if they are jointly responsible," Professor Cornish has observed that "[t]he United Kingdom is not a country in which ideas of free access to, and free use of, government information flourish with any vigour. Were this so, there would have developed, as in the United States, much more embracing notions of public domain material in which no copyright may be claimed. As it is, in Britain, the Crown has copyright even in Acts of Parliament and Church of England Measures. For these, as for delegated legislation and official reports, the government will doubtless continue to specify by Treasury Circular how far it will countenance free copying by others."[232]

Article 2*bis* of the Berne Paris Text allows member countries to choose whether to deny copyright to "political speeches and speeches delivered in the course of legal proceedings."[233] The principle behind the provision is that the Convention should not stymie free public access to such politically and legally affected information. Article 2*bis*(3), providing that "the author shall enjoy the exclusive right of making a collection of his works mentioned in the preceding paragraphs," is entirely consistent with this rationale.[234] "At the Brussels Revision (1948), the point was made that to give the authors of the works in question an exclusive right in no way hampered the reporting of political meetings and legal proceedings. To allow others to make and to publish collections of them was scarcely justified on the ground of freedom of information."[235]

§6.1.4 Formalities

§6.1.4.1 General Prohibition

Compliance with formalities as a condition to the enjoyment or exercise of copyright protection dates to the first copyright act, the British Statute of

231. *See* United Kingdom, Copyright, Designs and Patents Act 1988 §§163–167; Canada, Copyright Act §12. *See generally* Barry Torno, *Crown Copyright in Canada: A Legacy of Confusion* 38–48 (Consumer & Corporate Affairs Canada, 1981); David Vaver, *Copyright and the State in Canada and the United States*, 10 Int. Prop. J. 187 (1996).
232. Cornish 1996, 480 (footnotes omitted).
233. Berne Convention, 1971 Paris Text Art. 2*bis*(1).
234. Berne Convention, 1971 Paris Text Art. 2*bis*(3).
235. WIPO 1978, 25.

Anne of 1710. Under this act, registration and deposit of copies of a work at the Hall of the Stationers' Company were prerequisites to recover statutory forfeitures or penalties in a copyright infringement suit.[236] Legislation in England and other countries in the ensuing two centuries variously made copyright or its exercise depend on compliance with such formalities as registration, deposit, and affixation of notice of the author's claim of copyright to publicly distributed copies of the work. [237] This practice changed with the 1908 Berlin Act of the Berne Convention. Every text of the Convention, starting with the 1908 Act, has provided that "[t]he enjoyment and the exercise" of the rights guaranteed by the Convention in the works protected under the Convention "shall not be subject to any formality."[238]

The prohibition on formalities as a condition to copyright, presently embodied in Article 5(2) of the Paris Text, requires that protection for literary and artistic works in all countries of the Union be unencumbered by such formal requirements as affixation of copyright notice, registration, deposit of copies, payment of registration fees, or domestic manufacture.[239] The rule applies only to foreign Berne works; the work's country of origin may impose formalities as a condition to the work's protection.[240] So, for example, before the effective date of the Berne Implementation Amendments, March 1, 1989, the U.S. Copyright Act provided as a general rule that no action for copyright infringement could be instituted until registration had been made for the claim of copyright in issue."[241] As initially amended, the Act exempted "Berne Convention works whose country of origin is not the United States" from its requirement that a claim of copyright be registered as a prerequisite to an

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236. 8 Anne, c. 19 (1710), §§ II, V. The penalty for failure to deposit was five pounds plus the value of the copy and the legal costs of suit.
237. *See* Stef van Gompel, *Les formalités sont mortes, vive les formalités! Copyright formalities and the reasons for their decline in nineteenth-century Europe, in* Privilege and Property: Essays on the History of Copyright (Ronan Deazley, Martin Kretschmer and Lionel Bently eds., Oxford: Open Book Publishers, 2009), 157–206, for a comprehensive analysis of the rise and fall of copyright formalities in the United Kingdom, the Netherlands, France, and Germany.
238. Berne Convention, 1908 Berlin Text Art. 4(2); Berne Convention, 1928 Rome Text Art. 4(2); Berne Convention, 1948 Brussels Text Art. 4(2); Berne Convention, 1967 Stockholm Text Art. 5(2); Berne Convention, 1971 Paris Text Art. 5(2).
239. *See* WIPO 1978, 33.
240. Article 5(3) underlines this result in its provision that "[p]rotection in the country of origin is governed by domestic law." *See, e.g.*, Netherlands, Cassina S.p.a et.al. v. Jacobs Meubelen BV et.al., Supreme Court, May 26, 2000, [2002] GRUR Int. 1050, *cited in* P. Bernt Hugenholtz, *Chronicle of The Netherlands*, 187 R.I.D.A. (2001) 111 (provision in Benelux Designs Act requiring deposit of instrument of copyright reservation with Benelux Design Registry upon expiry of design right held to be in conflict with prohibition on formalities of Article 5(2) Berne Convention as regards foreign copyright holders). On determination of country of origin, see §8.3.1.2, below.
241. U.S. 1976 Copyright Act §411.

infringement action. As subsequently amended, the Act broadened the exemption for foreign works by confining the registration requirement to actions for infringement of copyright in any "United States work."[242]

Many countries continue to impose some form of deposit or registration requirement, although not as a condition to copyright.[243] French law requires the deposit of copies of works in national repositories, principally the National Museum.[244] Where they exist, deposit requirements serve as much to build the collections (at no cost) of national libraries as they do to preserve creative work. Legislation in the United Kingdom requires the deposit in the British Library—and, upon request, in other libraries in the UK and Ireland[245]—of one copy of any book published in the UK. Similarly, under Canadian law, two copies of any book published in Canada must be donated to the National Library.[246]

Registration, which like deposit is nowhere a requirement of copyright protection, today can serve a variety of purposes, most prominently to support evidential presumptions respecting the validity and ownership of copyright. Registered works enjoy both these presumptions under the Canadian Copyright Act; registration will also defeat a defendant's claim of innocence in mitigation of damages.[247] The German Copyright Act provides for a Register of Authors, situated in the German Patent Office, for registration of the author's true name in the case of anonymous and pseudonymous works; registration is to serve as a vehicle for the disclosure of identity required to

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242. For purposes of section 411, a work is a "United States work" only if
    (1) in the case of a published work, the work is first published
        (A) in the United States;
        (B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;
        (C) simultaneously in the United States and a foreign nation that is not a treaty party; or
        (D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;
    (2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, the authors are legal entities with headquarters in the United States; or
    (3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.
243. *See* WIPO Standing Committee on Copyright and Related Rights, *Survey of national legislation on voluntary registration systems for copyright and related rights*, SCCR/13/2, Geneva, November 9, 2005.
244. France, Heritage Code (*Code du Patrimoine*) Arts. L131 to L133; Decree on Statutory Deposit, No. 93-1429 of December 31, 1993.
245. Legal Deposit Libraries Act 2003, c-28.
246. National Library Act R.S.C. 1985, ch. N-12, §13.
247. Canada, Copyright Act, R.S.C. 1985 ch. C-42 §§53(2)–(34); 39(2).

extend the term of copyright in these works under Article 66(2) of the German Act.[248] Like the German Act, the Japanese Copyright Act provides for registration of the author's real name in the case of anonymous and pseudonymous works.[249]

Although in the United States affixation of copyright notice is no longer a condition to copyright protection, prudent copyright owners will nonetheless commonly affix to the copies or phonorecords that embody their works a copyright notice consisting of an encircled "c" together with the name of the copyright owner and the year of the work's first publication. One reason is that this form of notice is an inexpensive means for complying with all formalities—not just the notice formality—in those countries that have adhered to the Universal Copyright Convention. The U.C.C. provides that notice in this form will obviate compliance with "formalities such as deposit, registration, notice, notarial certificates, payment of fees or manufacture or publication" in any U.C.C. country of which the work's author is not a national, and in which the work was not first published.[250] A second reason to affix notice is entirely practical: copyright notice serves as a low-cost "No Trespassing" sign, alerting potential poachers to the copyright owner's seriousness about enforcing its rights.

§6.1.4.2 United States

Although certainly not the only country that imposed copyright formalities,[251] the United States during most of the twentieth century was well known for its insistence on compliance with formalities, including affixation of copyright notice, as a condition to copyright protection. The 1976 Copyright Act prescribes three formalities: affixation of copyright notice to publicly distributed copies and phonorecords of copyrighted works,[252] deposit of copies and phonorecords in the U.S. Copyright Office,[253] and registration of claims to copyright in the Copyright Office.[254] Although, since the 1976 Act's amendment by the Berne Convention Implementation Act of 1988,[255] none of these

248. Germany, Copyright Act Arts. 66(2), 138.
249. Japan, Copyright Act Art. 75. The Japanese legislation also provides specially for registration of computer programs. *See* Japan, Copyright Act Art. 76*bis*(1).
250. Universal Copyright Convention, 1971 Paris Text Art. III(1).
251. Countries that relied on copyright formalities included Spain, where formalities were abolished only by Law No. 22/1987 of November 11, 1987, on Intellectual Property, and most Latin American countries. In Uruguay, for example, formalities were continued until the adoption of Law No. 14.910 of July 19, 1979, and in Colombia until the adoption of Law No. 23 of January 28, 1982.
252. U.S. 1976 Copyright Act §§401, 402.
253. U.S. 1976 Copyright Act §§407, 408(b).
254. U.S. 1976 Copyright Act §408.
255. Pub. L. No. 100-568, 102 Stat, 2853 (Oct. 31, 1988).

formalities is a condition to copyright protection, formalities continue to be important under the Act. Affixation of copyright notice, though optional, may affect monetary recovery for infringement.[256] Failure to make the required deposit will subject the copyright owner to a fine.[257] A certificate of a registration made within five years of a work's first publication constitutes *prima facie* evidence of the copyright's validity and of the facts stated in the certificate.[258] Timely registration is required for a copyright owner to obtain statutory damages and attorney's fees for infringement.[259] Furthermore, for U.S. works, registration continues to be a condition to filing a copyright infringement suit.[260]

Notice

The notice requirements imposed by the 1909 Copyright Act[261] and by the 1976 Copyright Act before the effective date of the Berne Amendments, remain relevant today. If a work was published without the notice required by the 1909 Act before the date the 1976 Act took effect, January 1, 1978, it fell into the public domain and will not be protected under the 1976 Act. Similarly, if copyright notice was omitted from copies or phonorecords publicly distributed on or after January 1, 1978, but before the effective date of the Berne Amendments, March 1, 1989, and none of the 1976 Act's curative provisions saved the copyright, the work fell into the public domain and will not be protected under the 1976 Act as amended.

Unlike the 1976 Copyright Act, which made the notice requirement apply whenever a work was published inside or outside the United States with the authority of the copyright owner, the 1909 Copyright Act left open the question whether notice had to be affixed to copies of works first published outside the United States.[262] The governing rule under the 1909 Act appears to be that first publication abroad without copyright notice will not forfeit copyright. For example, in *Twin Books Corp. v. Walt Disney Co.*,[263] the court ruled that first publication of the children's classic *Bambi* in Germany in 1923 without copyright notice did not forfeit the work's U.S. copyright.[264]

256. U.S. 1976 Copyright Act §§401(d), 402(d).
257. U.S. 1976 Copyright Act §407(d).
258. U.S. 1976 Copyright Act §410(c).
259. U.S. 1976 Copyright Act §412.
260. U.S. 1976 Copyright Act §411.
261. U.S. 1909 Copyright Act §10.
262. U.S. 1909 Copyright Act §10.
263. 83 F.3d 1162 (9th Cir. 1996).
264. *See also* Heim v. Universal Pictures Co., 154 F.2d 480 (2d Cir. 1946).

Registration

Copyright registration may be obtained for a work at any time during the term of copyright and is not a condition to copyright. The 1976 Copyright Act does, however, offer several incentives to prompt registration. Section 410(c) of the Act limits the automatic *prima facie* effect of registration certificates to registrations made "before or within five years after the publication of the work," and section 412 provides as a rule that no award of statutory damages or attorney's fees shall be made for "(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work." Generally, if a work originated in the United States, or in a country with which the United States does not have copyright treaty relations, the claim to copyright must be registered before an infringement action can be instituted.[265] Although qualifying foreign works are exempt from this requirement, the procedural benefits arising from registration will usually more than repay the modest filing expense involved.

Deposit

The 1976 Copyright Act imposes mandatory deposit[266] and registration deposit[267] requirements, neither of which is a condition to copyright. The mandatory deposit provision requires the copyright owner of a work published

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265. U.S. 1976 Copyright Act §411.

Section 411 requires registration as a condition for instituting actions only against "infringement of copyright in any United States work." Section 101 provides that a work is a "United States work" only if

(1) in the case of a published work, the work is first published
(A) in the United States;
(B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;
(C) simultaneously in the United States and a foreign nation that is not a treaty party; or
(D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or

(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

266. U.S. 1976 Copyright Act §407.

267. U.S. 1976 Copyright Act §408(b).

in the United States to deposit two copies or phonorecords of the work within three months from the work's date of publication; failure to deposit the copies will subject the copyright owner to liability for fines and costs. Registration deposit is intended to identify the copyrighted work for purposes of registration. As a rule, "the material deposited for registration shall include (1) in the case of an unpublished work, one complete copy or phonorecord; (2) in the case of a published work, two complete copies or phonorecords of the best edition; (3) in the case of a work first published outside the United States, one complete copy or phonorecord as so published; (4) in the case of a contribution to a collective work, one complete copy or phonorecord of the best edition of the collective work."[268]

Domestic Manufacturing Requirement

Section 601 of the 1976 Copyright Act provides that, before July 1, 1986, and subject to specified exceptions, "the importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title is prohibited unless the portions consisting of such material have been manufactured in the United States or Canada." Importation or public distribution of copies of a work in violation of section 601 "does not invalidate protection for the work under this title," but it may give an infringer a complete defense in an infringement action.[269] By contrast, the counterpart requirement in the 1909 Act[270] at least arguably made forfeiture a sanction for noncompliance. If noncompliance forfeited copyright under the 1909 Act, a work published in violation of the manufacturing requirement before the effective date of the 1976 Act would be in the public domain in the United States except to the extent that copyright in the work was restored under the restoration provisions of the Uruguay Round Agreements Act.[271]

Renewal Formalities

The 1909 Copyright Act granted an initial term of copyright measured by 28 years from the work's first publication and a second, 28-year renewal term upon compliance with prescribed registration formalities.[272] Although the 1976 Act replaced the renewal feature with a single copyright term conforming to the Berne Convention's minimum standard, the Act retained the

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268. U.S. 1976 Copyright Act §408(b).
269. U.S. 1976 Copyright Act §601(d).
270. U.S. 1909 Copyright Act §16.
271. *See* §6.1.4.2, below.
272. U.S. 1909 Copyright Act §24.

renewal mechanism for works in their first copyright term on January 1, 1978, entitling authors of works in their first copyright term on that date to renew their copyrights for a further term of 47 years, extended by amendments enacted in 1998 to 67 years.[273]

In 1992 Congress amended the 1976 Act to divide works for which renewal registration is required, and those for which it is not, between works for which copyright was secured before January 1, 1964, and works for which copyright was secured between January 1, 1964, and December 31, 1977.[274] Copyrights secured before January 1, 1964, will enjoy a renewal term only if the author or other designated statutory claimant obtained a renewal registration within one year before the end of the original 28-year copyright term; absent renewal registration, the work fell into the public domain at the end of the original term, subject, however, to restoration under the Uruguay Round Agreements Act in appropriate cases.[275] By contrast, copyrights first secured between January 1, 1964, and December 31, 1977, are today automatically renewed for a 67-year term without registration in the twenty-eighth year.

Restoration of Copyright

Certain foreign works that fell into the public domain in the United States for failure to comply with statutory formalities have been restored to copyright under amendments to the U.S. Copyright Act made by the 1994 Uruguay Round Agreements Act.[276] Expanding on the far more limited restoration provisions of the North American Free Trade Agreement Implementation Act,[277] the Uruguay Round amendments restored copyright in all forms of copyrighted works and cured not only omissions of copyright notice but omission of other formalities such as failure to register for copyright renewal and to comply with domestic manufacturing requirements. The 1994 amendments also extended protection to foreign works that were in the public domain in the United States for reasons other than noncompliance with statutory formalities—sound recordings fixed before February 15, 1972, and works coming from a country with which the United States did not have copyright relations at the time the work was first published. At least one

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273. U.S. 1976 Copyright Act §304(a).
274. Pub. L. No. 102-307, 106 Stat. 264 (1992).
275. *See* §6.1.4.2, below.
276. Pub. L. No. 103-465, tit. v., 514, 108 Stat. 4809, 4976 (1994). Although Article 18 of the Berne Convention, 1971 Paris Act, obligated the United States to retroactively protect works that had fallen into the public domain for failure to comply with statutory formalities, the United States did not act on this obligation until legislation was passed implementing the TRIPs Agreement.
277. Pub. L. No. 103-182, 107 Stat. 2057 (1993).

appellate court in the United States has questioned the constitutionality of section 104A's restoration provisions.[278]

The 1994 Uruguay Round Agreements Act revised section 104A of the 1976 Copyright Act to vest copyright in qualifying foreign works "automatically on the date of restoration." January 1, 1996, is the date of restoration of copyright in a work whose source country was, on that date, a member of the World Trade Organization or an adherent to the Berne Convention.[279] Copyright in a restored work "shall subsist for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States."[280]

Section 104A restores copyright in any "original work of authorship" that meets three requirements: the work cannot be in the public domain in its source country through expiration of its term of protection there;[281] the work must have at least one author or rightholder "who was, at the time the work was created, a national or domiciliary of an eligible country";[282] and, if the work was published, it must have been "first published in an eligible country and not published in the United States during the 30-day period following publication in such eligible country."[283] The provision defines "restored work" to include not only foreign works that lost copyright through the omission of copyright notice but, more generally, works that fell into the public domain in the United States because of "(i) noncompliance with formalities imposed at any time by United States copyright law, including failure of

278. Golan v. Gonzales, 501 F.3d 1179 (10th Cir. 2007). On remand, the district court ruled that the provision violated plaintiff's constitutionally protected free speech interests because it removed certain foreign works from the public domain. In the court's view, Berne Convention Article 18 gives member countries ample leeway in implementing retroactivity and the U.S. Congress could have formulated a restoration provision that would at once satisfy both free speech interests and Article 18. Golan v. Holder, 611 F.Supp.2d 1165 (D.Colo. 2009).
279. U.S. 1976 Copyright Act §104A(h)(2).
280. U.S. 1976 Copyright Act §104A(a)(B).
281. U.S. 1976 Copyright Act §104A(h)(6)(B). Section 104A(h)(8) defines "source country" as:
    (A) a nation other than the United States;
    (B) in the case of an unpublished work—
        (i) the eligible country in which the author or rightholder is a national or domiciliary, or, if a restored work has more than 1 author or rightholder, of which the majority of foreign authors or rightholders are nationals or domiciliaries; or
        (ii) if the majority of authors or rightholders are not foreign, the nation other than the United States which has the most significant contacts with the work; and
    (C) in the case of a published work—
        (i) the eligible country in which the work is first published, or
        (ii) if the restored work is published on the same day in 2 or more eligible countries, the eligible country which has the most significant contacts with the work.
282. U.S. 1976 Copyright Act §104A(h)(6)(D).
283. U.S. 1976 Copyright Act §104A(h)(6))(D).

renewal . . . or failure to comply with any manufacturing requirements; (ii) lack of subject matter protection in the case of sound recordings fixed before February 15, 1972; or (iii) lack of national eligibility."[284]

Section 104A distinguishes between enforcement of restored copyrights against alleged infringers that did, and those that did not, invest in reliance on the work's earlier public domain status. If the infringer is not a "reliance party,"[285] full copyright remedies will automatically be available against it "on or after the date of restoration of a restored copyright with respect to an act of infringement of the restored copyright that is commenced on or after the date of restoration."[286] By contrast, the owner of a restored copyright who brings an infringement action against a reliance party must comply with either of two conditions. One condition requires the copyright owner to file a notice of intent to enforce the restored copyright within a period of 24 months beginning on the date of restoration; the notice is to be filed with the U.S. Copyright Office for publication by the Office in the Federal Register. Alternatively, the copyright owner can serve a notice of intent to enforce the restored copyright directly on the reliance party. If the copyright owner meets both conditions, the prescribed 12-month immunity period for the infringer runs from the earlier of publication or service of notice.[287]

A restoration enforcement notice may be filed with the U.S. Copyright Office only within 24 months of the work's restoration date, while a notice may be served on a reliance party at any time after the copyright's restoration.[288] A restoration enforcement notice filed in the Copyright Office will be effective against any potentially infringing use and against any potential

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284. U.S. 1976 Copyright Act §104A(h)(6)(C). An Administrative Action Statement on the 1994 amendments gives three examples of copyrights that will be restored under section 104A:

    A French short story that was first published without copyright notice in 1935 will be treated as if it had both been published with a proper notice and properly renewed, meaning that its restored copyright will expire on December 31, 2010 (75 years after the U.S. copyright would have come into existence);

    A Chinese play from 1983 will be protected until December 31st of the fiftieth year after the year in which its author dies; or

    A Mexican sound recording first published in Mexico in 1965 will be protected until December 31, 2040.

    Uruguay Round Agreements Act, Statement of Administrative Action, Pub. L. No. 103-465, 1994 U.S.C.C.A.N. 4040, 4290.

285. A "reliance party" is any person who "(A) with respect to a particular work, engages in acts, before the source country of that work becomes an eligible country, which would have violated section 106 if the restored work had been subject to copyright protection, and who, after the source country becomes an eligible country, continues to engage in such acts; (B) before the source country of a particular work becomes an eligible country, makes or acquires 1 or more copies or phonorecords of the work." U.S. 1976 Copyright Act §104A(h)(4).

286. U.S. 1976 Copyright Act §104A(d)(1).

287. U.S. 1976 Copyright Act §104A(d)(2).

288. U.S 1976 Copyright Act §104A(e).

infringer. By contrast, notice served directly on a reliance party will be effective only with respect to the use specified in the notice, and only against the party served or any third party who knows of its service and content. The Act effectively gives a reliance party a one-year grace period from the date it receives actual notice from the copyright owner, or constructive notice from the Copyright Office filing, whichever is earlier, during which to write off its investment in the restored work and exploit its own version in the marketplace.

In a departure from the 1976 Copyright Act's general silence on the question of what country's law is to govern determinations of authorship and initial ownership of copyright,[289] section 104A(b) provides that "[a] restored work [sic] vests initially in the author or initial rightholder of the work as determined by the law of the source country of the work." Read literally, this provision would vest ownership of the restored copyright in the work's author or original owner even in the event that, before copyright restoration, he assigned his rights to a third party. The Administration Action Statement suggests that the amendments intended a different result: "If the author or initial rightholder at any time assigned, licensed or otherwise alienated or disposed of an exclusive or non-exclusive interest in the copyright, that disposition is to be given effect according to the terms of the agreement."[290]

§6.1.5 Fixation

Countries divide on whether to require a work's fixation in some tangible medium as a condition to its protection. The Berne Paris Text supports this division by providing that it shall "be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form."[291] The U.S. Copyright Act's definition of fixation is typical: a work is fixed in a tangible medium of expression "when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[292]

By rough measure, countries requiring fixation as a condition to protection belong to the common law tradition of copyright, while those that do not are aligned with the civil law tradition. The division may have as much to do

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289. *See* §4.4.1.1, above.
290. Uruguay Round Agreements Act, Statement of Administrative Action, Pub. L. No. 103-465, 1994 U.S.C.C.A.N. 4040, 4290.
291. Berne Convention, 1971 Paris Text Art. 2(2).
292. U.S. 1976 Copyright Act §101.

with differences in approach to pleadings and proof between the two traditions as it does with differences in the underlying philosophies of copyright and author's right.[293] Also, Professor Ysolde Gendreau has suggested that the requirement occupies a historic trajectory and that "the abandonment of the criterion of fixation seems to reflect a more modern version of copyright"; while French legislation initially imposed a fixation requirement, case law and theory "gradually caused the law to develop so that fixation of the work ceased to be a precondition of protection."[294] Requirements may differ even among countries imposing a fixation requirement. For example, where the U.S. Copyright Act requires the fixation to be "by or under the authority of the author," the British legislation expressly makes the author's assent to the act of fixation unnecessary.[295]

§6.2 Performances, Phonograms, Broadcasts, Databases, and Other Productions

Performances, phonograms, and broadcasts make up the principal subject matter of neighboring rights. Together with other intellectual productions, such as databases, this subject matter "neighbors" the subject matter of author's right and copyright because it is thought to fall outside the domain of literary and artistic works and to lack the authorial creativity required for admission into the cathedral of author's right. Neighboring rights and other related rights are generally subject to neither the Berne nor the Universal Copyright Convention but to other international or regional treaty arrangements, and the conditions for protection of foreign works under neighboring rights agreements will often differ sharply from the national treatment principle of the two multilateral copyright conventions. The European Database Directive, for example, generally requires Council action before the Directive's *sui generis* protection will be extended to databases made in third countries, and "only if such third countries offer comparable protection to databases produced by nationals of a Member State or persons who have their habitual residence in the territory of the Community."[296] At the same time, where a country, such as

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293. "Even in those cases in which fixation is demanded as a matter of proof, one school of thought believes that, if a lecture is given extempore, or a tune improvised on the piano, and another records it, the latter, by doing so, perfects the copyright in favour of the lecturer or pianist." WIPO 1978, 18.
294. Ysolde Gendreau, *The Criterion of Fixation in Copyright Law*, 159 R.I.D.A. 110, 126 (1994).
295. United Kingdom, Copyright, Designs and Patents Act 1988 §3(3).
296. E.C. Database Directive Recital 56; Art. 11(3). At the time of writing, such an extension has been granted only to the Isle of Man, which although subject to the British Crown is

the United States, treats the subject matter of neighboring rights as the subject matter of copyright, the Berne and U.C.C. points of attachment will control protection in the United States.

As a rule, common law countries bring into copyright at least some of the subject matter that civil law countries usually protect under the rubric of neighboring rights. The United States, for example, extends copyright to sound recordings, broadcasts, and recorded performances.[297] The United Kingdom similarly brings sound recordings and broadcasts into copyright,[298] but remits unfixed performances to a separate regime,[299] and Canada brings these three forms of creative production under copyright.[300] Although common law countries grant copyright to sound recordings, broadcasts, and performances, the rights that they grant to these productions are less complete than those given to traditional copyright subject matter, and more like those granted under civil law provisions for neighboring rights. For example, while copyrighted sound recordings in the United States enjoy the full term of copyright protection, they receive only a limited version of the reproduction and public performance rights.[301] Other common law countries not only circumscribe rights for these productions, but also provide a shorter term of protection.[302]

It is a legal fiction that the subject matter of neighboring and other related rights necessarily lacks the authorial creativity that characterizes the subject matter of copyright and author's right. A performance by a leading concert pianist may embody as much, if not more, creativity as the trite advertising jingle that qualifies for author's right protection. On the other hand, the effort invested by a phonogram producer or a broadcaster in recording a musical performance or broadcasting an event will in many cases involve entrepreneurial and organizational skill rather than authorial creativity. Phonograms and broadcasts are typically large-scale, collaborative enterprises involving several coworkers with differing levels of responsibility. Unlike author's rights

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not part of the European Union. Council Decision 2003/239/EC of 18 February 2003 on the conclusion of an Agreement in the form of an Exchange of Letters between the United Kingdom of Great Britain and Northern Ireland on behalf of the Isle of Man and the European Community extending to the Isle of Man the legal protection of databases as provided for in Chapter III of Directive 96/9/EC, [2003] OJ L 89/11.

297. U.S. 1976 Copyright Act §102.
298. United Kingdom, Copyright, Designs and Patents Act 1988 c.48 §§5A, 6.
299. United Kingdom, Copyright, Designs and Patents Act 1988 c.48 §§180ff.
300. Canada, Copyright Act Part II.
301. U.S. 1976 Copyright Act §§106, 114. (Section 114(b) of the 1976 Act confines the reproduction right to "the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds of the recording," and section 106(6) limits the public performance right in sound recordings to the right "to perform the copyrighted work publicly by means of a digital audio transmission.")
302. *See* §9.2, below.

doctrine, with its rigid insistence that only humans can be authors and, consequently, initial right holders, neighboring rights doctrine easily accommodates the expedient of corporate creation and original ownership. The countries of the civil law tradition that offer neighboring rights protection tend to understand these rights as rights based on investment of human and financial resources rather than on creativity,[303] as is illustrated by the term commonly used in German law to denote neighboring rights: *Leistungsschutzrechte* (i.e., rights protecting performance).

National legislatures have in some places brought classes of subject matter other than performances, phonograms, and broadcasts onto this second tier of intellectual property protection. In the European Union, in addition to the traditional three categories of the Rome Convention, a neighboring right of distribution is granted to "producers of the first fixations of films," i.e., film producers.[304] "Film" in the E.C. Rental Right Directive is defined as "a cinematographic or audiovisual work or moving images, whether or not accompanied by sound" (Article 2(1)(c)). Originality is not required.[305] The German Copyright Act gives rights to publishers of scientific editions for substantial editorial contributions to public domain works,[306] and to photographers for their ordinary, routine photographs, such as school portraits, and photographs largely resulting from automated processes, such as aerial or satellite photography.[307]

The 1988 Copyright, Designs and Patents Act in the United Kingdom extends protection to "the typographical arrangements of published editions," effectively securing the publisher's investment in producing a published work against its unauthorized reproduction in facsimile form.[308] The Italian Copyright Act provides for a special neighboring right protecting titles, but only in connection with the works that the titles identify.[309] The E.C. Term of Protection Directive has added another category to this

303. *See, e.g.*, Sound engineer v. Šank Rock, Supreme Court of Slovenia, January 28, 1993, case no. II Ips 418/92 (holding that the work of a sound engineer is not sufficiently creative to qualify for copyright protection).
304. E.C. Rental Right Directive Art. 9.
305. *See, e.g.*, Germany, "Film Producer," Federal Supreme Court, October 22, 1992, Case 1 ZR 300190), 25 I.I.C. 287, 288 (1994) (the "achievement of the film producer . . . is not ascribable to an artistic-creative contribution to the substance of the film, although this may occasionally be the case, but in accepting the financial responsibility [and] organizational activities [necessary] for the production of an artistic work which is appropriate for exploitation.")
306. Germany, Copyright Act Art. 70. *See also* E.C. Term of Protection Directive Art. 5.
307. Germany, Copyright Act Art. 72.
308. United Kingdom, Copyright, Designs and Patents Act 1988 §§1(1)(c), 8. *See generally* Laddie et al. 1995, Chap. 8.
309. Italy, Copyright Act Art. 100 ("The title of a work, when it uniquely identifies the work, may not be reproduced in connection with any other work without the consent of the author").

taxonomy of neighboring rights, by mandating legal protection for first publications of previously unpublished works of which the copyrights have expired.[310] Thus a first edition of an unknown work of William Shakespeare would attract legal protection, which would expire 25 years after its first publication.[311]

The European Union's 1996 Database Directive requires member states not only to give copyright protection to the authorial elements of databases,[312] but also to "provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database."[313]

§6.2.1 Performances

The Rome Convention does not define "performances" but does define the "performers" whose activities will constitute a protected performance:[314] "performers means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works."[315] The WIPO Performances and Phonograms Treaty adopts this formulation but adds "interpret" to the possible activities of performers and "expressions of folklore" to the objects of a performance.[316] The WIPO *Guide to the Rome Convention* suggests that performers include not only those, such

See Olcese v. Ed. SPER, Supreme Court of Italy (Corte Suprema di Cassazione), September 4, 2004, Giustizia Civile, 2004, I, 2924—AIDA 2005, 444.

310. E.C. Term of Protection Directive Art. 4.
311. See for a rare decision concerning this right in Germany (Copyright Act Art. 71(1)) "Sky Disk of Nebra", Court of Magdeburg, October 16, 2003, *cited in* Silke von Lewinski, *News from Germany*, 206 R.I.D.A. 285 (2005).
312. E.C. Database Directive Art. 3(1). *See* §6.1.2.7, above.
313. E.C. Database Directive Art. 7(1). On the term of protection under this *sui generis* right, and the scope of the right, see §§8.2, 9.2.4, below.
314. "[A]s the General Report points out it was decided that obviously performance means the activities of a performer as such, and it was agreed that whenever the Convention uses the expression 'performance' or in the French text 'exécution' it must be understood as a generic term which also includes recitation and presentation ('récitation' and 'représentation')." WIPO 1981, 22.
315. Rome Convention Art. 3(a).
316. WIPO Performances and Phonograms Treaty Art. 2(a): "For the purposes of this Treaty: 'performers' are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore."

as singers or dancers, who directly interpret the work, but also participants, such as symphony orchestra conductors, who execute it.[317]

The Rome Convention makes the performance of "literary or artistic works" an essential part of its definition of "performers." The Convention does not require that the literary or artistic work be presently covered by copyright—the rendition of a public domain work will also qualify the performance for protection[318]—but the object of the performance must be a "work" in the sense of the Berne Convention or the U.C.C.[319] Article 9 of the Rome Convention leaves it to member states to decide whether to extend protection to "variety and circus artists" and others whose performances are not connected to literary or artistic works.[320]

In the European Union, the E.C. Rental Rights Directive and the Copyright in the Information Society Directive jointly guarantee that performers will enjoy a spectrum of rights in respect of their "performances," including a right of first fixation, without however offering a definition of the term "performance."[321] National legislation in Rome Convention countries generally conforms to the minimum standards implicit in the Convention's definition of performance. Some go beyond the minimum and include performances of variety acts or improvisation, as well as renditions of works,[322] or make explicit that all participants—conductors as well as players—qualify for protection.[323] The more subtle question of where performance leaves off and authorship begins—when, for example, a conductor's interpretation becomes an arrangement entitled to protection as a derivative work—requires the most delicate analysis of the copyright and neighboring rights laws of the protecting country.[324]

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317. "The French text uses, for the single word 'performer,' 'artiste interprète ou exécutant.' The words 'artiste interprète' are usually used of soloists and actors, whereas members of an orchestra, including the conductor are usually 'artistes exécutants.' In order that there should be no doubt that conductors of instrumental and vocal groups were protected, both were considered included in the expression 'artiste interprète ou exécutant.'" WIPO 1981, 21.
318. *See* WIPO 1981, 21.
319. WIPO 1981, 21.
320. Article 9 provides: "Any Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary or artistic works."
321. *See* §9.2.1, below.
322. *See, e.g.*, France, Intellectual Property Code Art. L. 212-1 ("[p]erformers shall be those persons who . . . perform . . . variety, circus or puppet acts"); United Kingdom, Copyright, Designs and Patents Act 1988 §180 ("'[p]erformance' means . . . a performance of a variety act or any similar presentation").
323. *See, e.g.*, Germany, Copyright Act Art. 73 ("[p]erformer means a person who . . . participates artistically in the recitation or performance of a work").
324. *See* §6.1.2.6, above.

In the United States, a performance will be protected under copyright law so long as it is fixed in a tangible medium of expression and meets the Copyright Act's modest originality standard. A filmed or videotaped circus performance, for example, will be no less protectible as a motion picture or other audiovisual work than would a scripted dramatic work.[325] Similarly, a vocal performance fixed on tape, compact disk, or other form of phonorecord will be protected as a "sound recording" under the Copyright Act.[326]

In the case of unfixed performances, protection in the United States may be available under state common law copyright or unfair competition doctrines.[327] For the unauthorized fixation, transmission, or marketing of the sounds, images, or both, of a live musical performance, an extensive array of remedies is available under federal antibootlegging provisions.[328] The United Kingdom and Canada give performers rights against the unauthorized fixation of their live performances, whether or not broadcast, as well as the unauthorized communication or distribution to the public of the live performance.[329] Since the TRIPs Agreement establishes these rights as a minimum standard,[330] nationals of WTO countries will enjoy this protection along with UK and Canadian nationals. Both countries also extend more substantial rights in performances, fixed or unfixed, but for other than national works require a point of attachment under the Rome Convention.[331]

§6.2.2 Phonograms

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, and the more closely circumscribed Geneva Phonograms Convention, define "phonogram" identically as "any exclusively aural fixation of sounds of a performance or of other sounds,"[332] and "producer of phonograms" identically as "the person who, or the legal entity which, first fixes the sounds of a performance or other

325. U.S. 1976 Copyright Act §102(a)(6).
326. U.S. 1976 Copyright Act §102(a)(7).
327. *See* Goldstein 2005, §17.4.
328. 17 United States Code ch. 11 (2006).
329. United Kingdom, Copyright, Designs and Patents Act 1988 §182; Canada, Copyright Act §15(1).
330. TRIPs Agreement Art. 14(1).
331. United Kingdom, Copyright, Designs and Patents Act 1988 §§181, 206; Canada, Copyright Act §15(2). *See generally* Richard Arnold, Performers' Rights (3d ed. 2004).
332. Rome Convention Art. 3(b); Geneva Phonograms Convention Art. 1(a). *Compare* WIPO Performances and Phonograms Treaty Art 2(b): "'phonogram' means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work."

sounds."[333] Although a phonogram may constitute the fixed form of a performance, the term is both broader and narrower than the product of a performance as defined in the Rome Convention. A phonogram may fix not only a performance of a work, but also "other sounds,"[334] and a phonogram can only be an aural, not a visual fixation. Also, while a performer will invariably be a flesh-and-blood participant, it will often be a corporate phonogram producer that arranges for and finances the fixation.

In the European Union, the Rental Rights Directive and the Copyright in the Information Society Directive jointly require member states to grant to phonogram producers various exclusive rights in respect of their "phonograms," without however defining this term.[335]

The U.S. Copyright Act includes among its copyrightable subject matter "sound recordings,"[336] defined as "works that result from the fixation of a series of musical, spoken or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."[337] According to the authoritative Congressional report on the 1976 Act, the protectible elements of a sound recording lie in the contributions "of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording."[338]

Although early British and Canadian legislation assimilated sound recordings to "works" for purposes of copyright protection—the 1911 British legislation treated them as musical works[339]—the contemporary approach in both countries is to distance these productions from traditional copyright, with discrete rules on initial ownership, term, and scope of rights.[340] The British Act defines "sound recording" as "a recording of sounds, from which the sounds may be reproduced, or a recording of the whole or any part of a literary,

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333. Rome Convention Art. 3(c); Geneva Phonograms Convention Art. 1(b). *Compare* WIPO Performances and Phonograms Treaty Art. 2(d): "'producer of a phonogram' means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds."
334. "[T]he fixation may be of sounds of a performance or of other sounds. During the Rome Conference bird-song and natural noises were given as examples of the latter. In other words, whatever the origin of the sound, the phonogram as such is protected by the Convention." WIPO 1981, 22.
335. *See* §9.2.2, below.
336. U.S. 1976 Copyright Act §102(a)(7).
337. U.S. 1976 Copyright Act §101.
338. U.S. House Report 56.
339. 1911 British Copyright Act §1(2). *See generally* Laddie et al. 2000, 349–350 (2000).
340. *See* §9.2.2, below.

dramatic or musical work, from which sounds reproducing the work or part may be produced, regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced."[341] The Canadian Act defines "sound recording" as "a recording, fixed in any material form, consisting of sounds, whether or not of a performance of a work, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work."[342] Unlike the U.S. Act, which treats motion picture sound tracks as motion pictures for all purposes,[343] the British Act, and at least arguably the Canadian Act,[344] treat sound tracks as sound recordings, except where they accompany the film itself.

§6.2.3 Broadcasts

Of the three classes of neighboring rights subject matter that the Rome Convention brings under protection, the Convention is least explicit about the products of broadcasting organizations. The Convention's definition of "broadcasting" as "the transmission by wireless means for public reception of sounds or of images and sounds" implies protection for a broadcaster's technical contributions to the assembly and production as well as for the transmission of both live and prerecorded events, entirely apart from any works, performances, or phonograms that may be embodied in the broadcast.[345] In other words, the legal protection offered under the Rome regime concerns the broadcast *signals* and does not extend to the films, television programs, and other audiovisual content carried by the signals. Protection for broadcast signals may also be granted under legislation or case law securing a country's obligations under the Brussels Satellite Convention's provisions respecting program-carrying signals.[346]

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341. United Kingdom, Copyright, Designs and Patents Act 1988 §5A(1).
342. Canada, Copyright Act §2.
343. U.S. 1976 Copyright Act §101 (definition of "motion pictures.").
344. *See* John McKeown, Fox on Canadian Law of Copyright and Industrial Designs §14:1 (4th ed. 2007).
345. Rome Convention Art. 3(f). *Compare* WIPO Performances and Phonograms Treaty Art. 2(f): "'broadcasting' means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also 'broadcasting'; transmission of encrypted signals is 'broadcasting' where the means for decrypting are provided to the public by the broadcasting organisation or with its consent." A proposed international treaty aimed at strengthening the protection of broadcasters to include unauthorized retransmission of broadcast signals over the Internet has been negotiated at WIPO since 2005. *See* WIPO Revised draft basic proposal for the WIPO Treaty on the protection of broadcasting organizations, WIPO SCCR Fifteenth Session, Geneva, September 11–13, 2006.
346. Brussels Satellite Convention 1974 Art. 2(1).

Broadcasts are protected by copyright in the United States. Since piracy will often occur as the broadcast is made and before it can be fixed in some material support, the U.S. Copyright Act has defined the term "fixed" to make copyright available to producers whose live broadcasts reach the public in unfixed form, so long as the broadcaster ensures that the signal is fixed simultaneously with the broadcast: "A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission."[347] Thus, someone who, without authority, retransmits or copies a live broadcast off the air will be liable for infringing the copyright in the content of the broadcast if the copyright owner had simultaneously fixed the broadcast in a copy or phonorecord.[348]

Together, the E.C. Rental Rights Directive and the E.C. Copyright in the Information Society Directive instruct the Member States of the European Union to grant to broadcasting organizations various exclusive rights regarding their "broadcasts," again without offering a definition of this term.[349] The British Copyright, Designs and Patents Act defines "broadcast" for purposes of copyright protection as "an electronic transmission of visual images, sounds, or other information which (a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them, or (b) is transmitted at a time determined solely by the person making the transmission for presentation to members of the public."[350] Although the definition expressly excludes Internet transmissions,[351]it reduces the economic consequence of this exclusion by carving out, among others, exceptions for webcasts that are simultaneous with broadcasts or that constitute a "concurrent transmission of a live event" (such as a sports event).[352]

§6.2.4 Databases

The E.C. Database Directive of 1996 created a two-tier protection regime for databases in the Member States of the European Union. First, in so far as the selection and arrangement of the database's contents constitute "the author's

347. U.S. 1976 Copyright Act §101. U.S. House Report, 52.
348. This special provision for live broadcasts is restricted to works that are "transmitted." As a result, an actor, singer, or musician whose performance is being simultaneously fixed, but is not being transmitted, will have no rights under the Copyright Act against someone in the audience who copies his performance. He may, however, have rights under state or federal antibootlegging laws. *See* §6.2.1, above.
349. *See* §9.2.3, below.
350. United Kingdom, Copyright, Designs and Patents Act 1988 §6(1).
351. United Kingdom, Copyright, Designs and Patents Act 1988 §6(1A).
352. United Kingdom, Copyright, Designs and Patents Act 1988 §6(1A).

own intellectual creation,"[353] member states are to protect them by copyright as intellectual creations.[354] Second, and more significantly, E.U. countries must provide for a *sui generis* database right to protect the contents of a database in which the producer has substantially invested.[355] Both rights will apply cumulatively if the prerequisites for both regimes are fulfilled.

The Directive "concerns the legal protection of databases in any form"[356] and thus protects not only electronic databases, but also databases in "analogue" form. The Directive defines the term "database" in sweeping terms as "a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means." The items collected in a database must be "independent" and "individually accessible by electronic or other means."[357] Additionally, the elements of the database must be "arranged in a systematic or methodical way."[358] The Directive does not, however, protect the computer software driving the database as such. Computer programs are protected independently under the E.C. Software Directive .[359]

Case law from various national courts in Europe demonstrates that the notion of "database" is open ended, leaving room for a wide variety of information products and services. Courts have, for example, granted database protection to telephone directories, collections of legal materials, real estate information websites, radio and television guides, bibliographies, encyclopedias, address lists, company registries, exhibition catalogues, tourism websites, collections of hyperlinks, and hit parades.

As an intellectual property right *sui generis* (i.e., of its own kind), the database right prescribed by the Directive is not a copyright and does not as such fit into any other general category of intellectual property rights. In view of its intended purpose to protect economic investment in database production, the *sui generis* right is akin to the neighboring rights of phonogram producers and film producers. Indeed in many member states, including Germany, France, Spain, Portugal, and Italy, the right has been transposed as a special neighboring right. In other member states, such as the Netherlands

353. E.C. Database Directive Art. 3(1).
354. E.C. Database Directive Art. 3(1).
355. E.C. Database Directive Art. 7.
356. E.C. Database Directive Art. 1(1).
357. *See* Fixtures Marketing Ltd v. OPAP, European Court of Justice, November 9, 2004, case C-444/02 (holding that the elements of a database must be "separable from one another without the value of their contents being affected").
358. *See, e.g.*, Netherlands, Wegener v. Hunter, Court of Appeal Leeuwarden, November 27, 2002, [2003] GRUR Int. 1032–1035 (holding that the jobs section of a daily newspaper was sufficiently "arranged" to qualify as a protected database).
359. E.C. Database Directive Art. 1(3).

and Belgium, the right has been enacted in a special act, illustrating its truly *sui generis* status.

Judicial decisions in the Netherlands and the United States that copyright does not protect databases that result merely from economic investment or intellectual effort helped to spur the introduction of *sui generis* protection.[360] Before implementation of the Directive, intellectual property protection for nonoriginal compilations existed in just a few member states (notably the United Kingdom, Denmark, Sweden, and the Netherlands). Many member states provided only for unfair competition remedies, to be applied under special circumstances, or no remedies at all.

Where copyright protects only the original structure of the database (that is, the selection or arrangement of its contents), the *sui generis* right protects the contents themselves, on condition that the database reflects substantial investment "in either the obtaining, verification or presentation of the contents" of the database. "Obtaining" concerns seeking out existing independent materials and collecting them in the database but does not cover the resources used for the creation of materials that make up the contents of a database, such as the effort involved in designing a schedule of sporting events.[361] "Verification" relates to the checking, correcting, and updating of data already existing in the database. "Presentation" involves the retrieval and communication of the compiled data, such as the digitization of analog files, the creation of a thesaurus, or the design of a user interface.

The investment in a database must be "substantial" to qualify for protection, and the substantiality can be either "qualitative" or "quantitative." In practice, most databases will probably result from quantitative investment, involving "the deployment of financial resources and/or the expending of time, effort and energy."[362]

§6.2.5 Formalities

As a rule, national legislatures do not impose formalities as a condition to protection of neighboring rights. However, against the possibility that a

360. Feist Publications, Inc. v. Rural Telephone Service Co., Inc., U.S. Supreme Court, March 27, 1991, 111 S.Ct. 1282 (1991); Netherlands, Van Dale v. Romme, Hoge Raad, January 4, 1991 (English trans. *in* Dommering & Hugenholtz 1991, 93). *See also* Germany, Tele-Info-CD, Federal Supreme Court, May 6, 1999, Case No. I ZR 199/96; 31 I.I.C. (2000) 1055 (no copyright protection for telephone directories); Germany, "Poem Title List," Federal Supreme Court, May 24, 2007, Case I ZR 130/04, 39 I.I.C. 985 (2008) (list of important German poems deemed protected work of authorship, based on individual selection and arrangement).

361. British Horseracing Board v. William Hill Organization, European Court of Justice, November 9, 2004, case C-203/02, ECR [2004] I-10415.

362. E.C. Database Directive Recital 40.

country will impose formalities against foreign phonogram producers or performers whose performances are fixed in phonograms, the Rome Convention provides that any such formality "shall be considered as fulfilled" if all copies of the phonogram, or its packages, bear a notice consisting of an encircled "P" "accompanied by the year date of first publication, placed in such a manner as to give reasonable notice of claim of protection."[363] The Geneva Phonograms Convention makes comparable provisions for complying with formalities in foreign countries.[364]

As a practical matter, since phonogram producers and performers will not be able to control the ultimate destination of their products, it is prudent for them to affix the notice prescribed by the Rome and Geneva Conventions to their products against the event that the destination turns out to be a Rome or Geneva Convention country that requires formalities as a condition to protection. The notice option offered by the Rome and Geneva Conventions is far from onerous and will commonly be met by the presence on the packaging of the name of the record company and the performers involved, together with the symbol of the encircled "P" and the year date of publication. Further, the WIPO *Guide to the Rome Convention and to the Phonograms Convention* underscores a point that applies to the Geneva Convention as well: "It was also clearly understood that, in countries where no formalities are required as a condition of protection, convention protection must be granted even if the phonogram does not bear the notice specified by the Convention."[365]

363. Rome Convention Art. 11.
364. Geneva Phonograms Convention Art. 5.
365. WIPO 1981, 45.

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CHAPTER
7

Authorship and Ownership

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The Berne Convention and the other conventions are virtually silent on two salient questions: Who qualifies as the author and original owner of rights in a literary or artistic work? What requirements, if any, must be met for a transfer of these rights to be effective? A provision in the July 23, 1990, draft of the copyright provisions of the TRIPs Agreement would have provided that rights "shall be freely and separately exploitable and transferable," but it was ultimately dropped.[1] The consequence—and doubtless also the cause—of the silence of international agreements on these important questions is that countries vary, sometimes widely, in the answers they have given. Professor Eugen Ulmer's observation on the diverse treatment of copyright contracts, made in 1976, remains true today: "[I]n some instances we find detailed statutory regulations; in others the laws contain but a few general provisions and regulate only specific types of contracts; in still others statutory provisions on this subject are almost totally absent. Only a few rules are generally recognized, for example, the principle that an author who has sold the original of his work will not be presumed to have transferred the copyright exploitation rights."[2]

Over the past several decades, the problem of identifying a work's author or authors has been magnified by the trend to large-scale collaboration in the creation of literary and artistic works. Motion pictures, computer programs, and collective works such as encyclopedias are examples. This development has placed particular strains on the civil law tradition, which has had to reconcile a philosophical commitment to the autonomy of the individual author with the economic pressure to consolidate ownership in a single individual or institution to facilitate a work's exploitation in the marketplace.

Changes in the conditions of authorship have produced changes in the legal definition of authors. Consequently, in tracing a work's chain of title, attention needs to be paid to the legal definition of author that obtained under the applicable national law at the time of the work's creation or first publication. Under U.S. law, for example, some works that the 1909 Copyright Act would have characterized as joint works or as works made for hire will not be joint works or works for hire under the 1976 Copyright Act. This means that, in tracing the chain of title to a work published before the effective date of the 1976 Act, January 1, 1978, the prospective transferee needs to consult the 1909 Act's rules on authorship to identify the work's author and original owner.[3]

Sections 1–5 of this chapter trace legal patterns of authorship and initial ownership from simple to complex arrangements—from individual authorship[4] to collaborative authorship,[5] to works created in the course of an

1. Gervais 1998, 102.
2. Ulmer 1976.
3. *See, e.g.*, Roth v. Pritikin, 710 F.2d 934, 937–939 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983), *aff'd in part, rev'd in part on remand*, 787 F.2d 54 (2d Cir. 1986).
4. *See* §7.1, below.
5. *See* §7.2 and §7.3, below.

employment relationship.[6] Motion pictures, which commonly embody elements of both collaborative and employed creativity, are considered next.[7] The final section describes the rules and institutions that regulate transfers from the initial copyright owner: limitations on the principle of freedom of contract, including constructional presumptions,[8] rules on formalities and priorities between competing transfers,[9] and regulation of collective rights management.[10]

§7.1 Initial Authorship and Ownership

The international treaties do not offer much guidance on the question of authorship. The Berne Convention does not define the "author" of a work, leaving this to the contracting parties. However, according to Professor Ricketson, the Convention's text and historical context strongly suggest that "author" and "authorship" for purposes of the Convention are to be interpreted as pertaining to the natural person who created the work.[11] As a rule, copyright legislation in both civil law and common law countries identifies a work's author, and its original owner, as the flesh-and-blood, natural person who conceived and executed the work.[12]

The rule that the author is the initial copyright owner is commonly known as the "creator doctrine." Under specific circumstances, many countries provide for exceptions and allocate initial ownership to entities, including legal persons, other than the creator. As can be expected, such rules are more common in common law than in civil law countries. But even in "hard-line" author's rights countries, such as France, certain exceptions to the creator doctrine exist. As Dr. Seignette has demonstrated, such deviations often result from the desire to protect the investment of producers and intermediaries.[13] Consequently, the need for such deviations decreases as neighboring rights aimed specifically at protecting such investments are introduced.

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6. *See* §7.4, below.
7. *See* §7.5, below.
8. *See* §7.6.1, below.
9. *See* §7.6.2, below.
10. *See* §7.6.3, below.
11. S. Ricketson, *People or Machines*, Columbia-VLA Journal of Law & the Arts, Vol. 16:1, 8, 11.
12. *See* Chapter 2.
13. Jacqueline M.B. Seignette, Challenges to the Creator Doctrine. Authorship, Copyright Ownership and the Exploitation of Creative Works in The Netherlands, Germany and The United States (1994).

French law, for example, permits original ownership of copyright to vest in corporate, as opposed to natural, persons in the case of collective works (*oeuvres collectives*)[14] and of computer programs created in the course of employment, in which case copyright vests in the employer.[15] Dutch law more generally designates as "authors" the employers of creators of works made in the course of employment,[16] as well as legal persons that publish commissioned works without indicating authorship.[17]

Common law countries are notably less insistent than civil law countries in the requirement that a work's author and initial copyright owner be a natural person or persons. The British legislation vests copyright in literary, dramatic, musical, and artistic works in the work's actual author,[18] subject only to encompassing rules on works made for hire[19] and a special provision for computer-generated works, for which the author and initial owner is "the person by whom the arrangements necessary for the creation of the work are undertaken."[20] As a rule, the Australian and Canadian Acts also vest initial ownership in a work's creator but treat the employer as the initial owner if the work was prepared in the course of employment.[21] The U.S. Copyright Act similarly vests copyright in the employer in the case of works made for hire but, unlike the other common law countries, characterizes the employer in this case as not only the initial copyright owner, but the work's author as well.[22]

The European Directives are mostly silent on the issue of authorship, except in respect of audiovisual works[23] and computer programs. According to Article 2 of the E.C. Software Directive, the author of a computer program is deemed to be the natural person or group of natural persons who created the program or, where the legislation of the member state permits, the legal person designated as the rights holder by that legislation.[24]

The usual insistence in civil law countries that the original owner be a natural, not a corporate person is generally absent from neighboring rights legislation, which, though encompassing human performers, also contemplates phonogram producers and broadcasting organizations—categories in

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14. France, Intellectual Property Code Art. L. 113-5.
15. France, Intellectual Property Code Art. L. 113-9.
16. Netherlands, Copyright Act Art. 7.
17. Netherlands, Copyright Act Art. 8.
18. United Kingdom, Copyright, Designs and Patents Act 1988 §§9, 11.
19. United Kingdom, Copyright, Designs and Patents Act 1988 §11(2). *See generally* §7.4 below.
20. United Kingdom, Copyright, Designs and Patents Act 1988 §9(3). The copyright in such computer-generated productions runs for the shorter term of 50 years from publication; no moral rights are conferred (CDPA Art. 178).
21. Australia, Copyright Act §§35(2), 35(6); Canada, Copyright Act §§13(1), 13(3).
22. *See* §7.4, below.
23. *See* §7.5, below.
24. E.C. Software Directive Art. 2(1).

which corporate rather than natural persons will typically predominate.[25] For example, the French Intellectual Property Code vests the ownership of a sound recording in its producer, defined as any "natural or legal person who takes the initiative and responsibility for the initial fixation of a sequence of sounds."[26] The German Copyright Act gives "the exclusive right to reproduce and distribute" a sound recording to its producer; "[i]f the audio recording has been produced by an enterprise, the owner of the enterprise shall be deemed the producer."[27]

In the case of sound recordings, the 1988 Copyright, Designs and Patents Act in the United Kingdom vests authorship and initial ownership in "the person by whom the arrangements necessary for the making" are undertaken,[28] and, in the case of broadcasts, copyright vests initially in the person making the broadcast.[29] The Canadian legislation similarly assigns copyright in broadcasts to the entity initiating the broadcast,[30] and initial ownership of sound recordings to the person responsible for the recording's first fixation.[31] The U.S. Copyright Act vests copyright in sound recordings, as it does for every other work, in the "author" of the sound recording;[32] in most cases, however, the sound recording will be made for hire and the author will be a corporate employer.

Article 15(1) of the Paris Text of the Berne Convention establishes a general presumption of authorship, and consequently initial ownership, for purposes of legal standing: "In order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner."[33] Although Article 15(1) explicitly aims its presumption of authorship at the infringement context,[34] it will

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25. Note that the issue of ownership of neighboring rights has remained largely unharmonized in the European Union, except for the *sui generis* database right. The E.C. Database Directive defines the owner of the database right as the "maker of a database" (Art. 7(1)), i.e., "the person who takes the initiative and the risk of investing" (Recital 41). See §6.2.4, above.
26. France, Intellectual Property Code Art. L.213-1.
27. Germany, Copyright Act Art. 85(1).
28. United Kingdom, Copyright, Designs and Patents Act 1988 §9(2)(a).
29. United Kingdom, Copyright, Designs and Patents Act §9(2)(b).
30. Canada, Copyright Act, §24(c).
31. Canada, Copyright Act §§18(1), 24(b).
32. U.S. 1976 Copyright Act §201(a).
33. Berne Convention, 1971 Paris Text Art. 15(1). By its terms, Article 15(1) will apply even if the author's name is a pseudonym, "where the pseudonym adopted by the author leaves no doubt as to his identity." Berne Convention, 1971 Paris Text Art. 15(1). Article 15(3) covers the situation of anonymous and pseudonymous works where the author's identity is unknown.
34. "The Convention does not define 'author' but establishes a presumption that it is he who is entitled to bring action to assert the copyright in the work. It is enough for this purpose for his name to appear on the work in the usual manner. The courts are left to give precise meaning

inevitably affect the conduct of transactions, since a licensee from someone other than the presumptive author faces the risk that it will have to defend an infringement lawsuit brought against it by the presumptive author. The European Union's Enforcement Directive provides for a presumption of authorship or ownership similar to Berne's Article 15, while extending its scope to holders of neighboring ("related") rights.[35]

National law may enlarge Article 15(1)'s presumption respecting authorship. The German Copyright Act, for example, provides that where the author's name does not appear in the customary manner, but the editor's or publisher's name does appear, the editor or publisher will be presumed to have standing to assert the author's rights.[36] Under the French and British legislation, the author is presumed to be the person who is named as such on published copies of the work.[37] The U.S. Copyright Act connects its presumption of authorship to information appearing not on copies of the work but, rather, in the work's certificate of copyright registration as part of its rule that a certificate of registration secured before or within five years of a work's publication shall constitute presumptive evidence of the validity of the copyright and the facts, including authorship, stated in the certificate.[38]

§7.2 Collaborative (Joint) Authorship

Where two or more authors have collaborated in creating a single work, legislation in most countries will treat them as coauthors and co-owners and will measure the work's term of protection from the death of the last surviving coauthor, so long as the required relationship exists between their contributions.[39] A classic instance of a joint work would be a text written by two authors, each contributing ideas and expression, text, and editorial changes to every page.

As a general rule, for a work to qualify as a joint or collaborative work and for a contributor to qualify as a coauthor, each contributor must have brought creative expression to the work. For example, an American court held that a client who merely contributed ideas, directed changes, and exercised approval

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to this general expression. If an alleged infringer wishes to show that the author is not the copyright owner, he must prove it." WIPO 1978, 93.

35. Directive 2004/48/EC on the enforcement of intellectual property rights, OJ No. L 195/16, June 2, 2004 (E.C. Enforcement Directive), Art. 5.
36. Germany, Copyright Act Art. 10(2).
37. France, Intellectual Property Code Art. L. 113-1; United Kingdom, Copyright, Designs and Patents Act 1988 §104(2).
38. U.S. 1976 Copyright Act §410(c).
39. *See* §8.1.1.2, below.

power at each stage of an architect's work was not a coauthor of the resulting architectural plans.[40] However, a contribution to a joint work need not be quantitatively or qualitatively equal to the other contributions, so long as it meets the threshold of protectible expression. For example, the Dutch Supreme Court held in the case of *Kluwer v. Lamoth* that a stylist who assisted a photographer by creatively arranging needlework pieces for the photograph was a coauthor with the photographer of the resulting photographs.[41]

A second requirement generally applied to joint works is that the contributions of the coauthors be inseparably connected. How inseparable must the contributions to a joint work be? Some countries measure the coalescence required of contributions to joint works in abstract terms. The United Kingdom's Copyright, Designs and Patents Act, for example, contemplates a "work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors."[42] The 1976 U.S. Copyright Act defines a joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[43] This formula mirrors the test first announced by an English court a century earlier: "To constitute joint authorship, there must be a common design."[44] The French Court of Cassation has stated the requirement as "concerted creative effort undertaken jointly by several authors."[45]

Other countries measure the required merger of elements in economic terms. The German Act, for example, requires not only that "several persons have created a work jointly," but also that "their respective contributions cannot be separately exploited."[46] The contributions need not, however, have been made simultaneously.[47] The Japanese legislation, modeled in this respect after the German statute, defines joint works as works that are "created by

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40. Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co., 542 F. Supp. 252, 259 (D. Neb. 1982).
41. Netherlands, Kluwer v. Lamoth, Supreme Court, June 1, 1990, *cited in* Hugenholtz 1996, 173.
42. United Kingdom, Copyright, Designs and Patents Act 1988 §10(1). *See also* Australia, Copyright Act §10 ("[W]ork of joint authorship means a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors."); Canada, Copyright §2 ("'[W]ork of joint authorship' means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.").
43. U.S. 1976 Copyright Act §101.
44. Levy v. Rutley, 6 L.R.-C.P. 523, 529 (1871).
45. Le Brun v. SA Braesheather, Cass. 1st Civ. Chamber, Oct. 18, 1994, 164 R.I.D.A. 304, 308 (1995).
46. Germany, Copyright Act Art. 8(1). *See also* Japan, Copyright Act Art. 2(1)(xii).
47. *Buchhaltungsprogramm* ("Accounting Program"), German Federal Supreme Court, July 14, 1993 (Case No. I ZR 47/91), (1995), 26 I.I.C. 127.

two or more persons in which the contribution of each person cannot be separately exploited."[48] Applied literally, the approach might, for example, withhold joint work status from a musical drama, in which the songs could be exploited separately from the libretto, and even from certain individual songs in which the words might be exploited separately from the music.

Legislation in most countries bars one coauthor, or his successor in interest, from altering or exploiting the collaborative work without the consent of the work's other coauthors, and in many of these countries the other coauthors cannot withhold their consent to the proposed exploitation other than in good faith and for justifiable cause.[49] The French Intellectual Property Code carves out an important exception to this rule for joint works, such as musical dramas, in which individual contributions belong to distinct genres, such as libretto and music; in these cases each contributor may, absent an agreement to the contrary, exploit his contribution without consent of his coauthors, so long as these activities do not interfere with the exploitation of the joint work.[50] In this respect, the French law approximates the effect of the German approach to defining joint works, which would characterize the contribution of individual genres as separate works rather than contributions to a joint work. The operational difference between the two is that under the German approach each contribution enjoys its own copyright term, while under the French approach, each contribution enjoys the term that attaches to the joint work as a whole.[51]

These different approaches to the issue of separability have led to disparate terms of copyright protection across the European Union, particularly in the case of cowritten musical works, where these differences are most evident. This disparity prompted a proposal by the European Commission[52] to harmonize the rules on term calculation with respect to such works. Under the proposal, the term of protection for a cowritten musical work would be calculated from the death of the surviving contributor (lyricist or composer), regardless of whether domestic law grants these authors independent copyrights in their own contribution or joint copyright in the combined contributions.[53]

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48. Japan, Copyright Act Art. 2(1)(xii).
49. *See, e.g.*, Japan, Copyright Act Arts. 64–65; Germany, Copyright Act Art. 8(2). *Compare* France, Intellectual Property Code Art. L 113-3. ("In the event of failure to agree, the civil courts should decide.")
50. France, Intellectual Property Code Art. L. 113-3.
51. *See* §8.1.1.2, below.
52. Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights, COM (2008) 464 final, Brussels Jul. 16, 2008, [Term Extension Proposal, 2008].
53. *See* van Eechoud et al. 2009, Chapter 6.

The United States is the most prominent exception to the rule requiring unanimous consent among co-owners as a condition to exploitation of a joint work. Case law in the United States entitles each co-owner to exploit the copyright in a work himself, or to license others to do so; each must, however, account to his co-owners for any profits earned.[54] Because each co-owner has an undivided fractional interest in the entire work, he may, without the consent of the other co-owner, license the exploitation even of elements he did not himself create; for example the lyric writer could license a third party to record and perform a composition's musical elements alone. But, because each co-owner can individually grant only a non-exclusive license, and since third parties will often accept no less than an exclusive license—which can be granted only by all co-owners jointly—the principal effect of the American rule is to immunize from liability the co-owner who exploits the work himself.

Coauthors can, at the time they create their work, anticipate and resolve by contract any later disagreements between themselves over the manner and timing of the work's exploitation. This means that in the great majority of countries that require unanimous consent to a work's exploitation, the coauthors can, even before they create the work, enter into an agreement on terms that will obviate the need for subsequent consent. Similarly, in the United States, the coauthors can agree to require unanimous consent. Although collaborators may contract to alter these and other incidents of co-ownership, they cannot by contract make a collaborative work out of a work that lacks the required inseparable expression or, for that matter, contractually defeat the legal status of a true collaborative work. In this sense, joint works are the product of status, not contract.

§7.3 Collective Works

A work by two or more authors that lacks the coalescence of elements required for a joint work may in some countries qualify for treatment as a collective work. The notion of collective work has different connotations in different jurisdictions. The German Copyright Act, for example, provides that authors who contribute discrete elements to a common work will retain individual copyright in these elements and that the copyright term of each contribution will be measured from the death of its respective author. As with joint works, however, each contributing author may require consent to alteration or exploitation of all authors who contributed to the work "if such consent may

54. *See, e.g.*, Richmond v. Weiner, 353 F.2d 41, 46 (9th Cir. 1965), *cert. denied*, 384 U.S. 928, *reh'g denied*, 384 U.S. 994 (1966). *See generally* Goldstein 1996, §4.2.2

reasonably be demanded of them."[55] By contrast, French legislation defines a collective work ("*oeuvre collective*") as a work "created at the initiative of a natural or legal person who edits it, publishes it and discloses it under his direction and name and in which the personal contributions of the various authors who participated in its production are merged together in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created."[56] Typical examples of "*oeuvres collectives*" are daily newspapers, encyclopedias, and dictionaries.[57] Authorship and copyright in the work vests in the editor and publisher of the work,[58] one of only two instances under French law in which ownership can vest initially in a legal person.[59]

Under decisional law in the United Kingdom, contributors to a collective work will obtain copyright for their individual contributions, and the editor responsible for the selection and arrangement of the contributions will receive a separate copyright for his efforts, so long as they meet the governing originality standard.[60] Legislation in Canada similarly provides for collective works.[61] The U.S. Copyright Act distinguishes between copyright ownership of a collective work, which vests initially in the creator of the collective work, and copyright ownership of individual contributions to the collective work, which vests initially in the author of the contribution. Absent an express transfer of copyright by the contributor, "the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."[62]

§7.4 Works Made for Hire or under Employment

Employers regularly contract with their creative employees over the allocation of rights in works created in the course of employment. Civil law countries

55. Germany, Copyright Act Art. 9.
56. France, Intellectual Property Code Art. L. 113-2.
57. *See, e.g.*, France, "Petit Robert Dictionary," Court of Cassation, November 16, 2004, 204 R.I.D.A. 236 (2005) (Petit Robert dictionary deemed "*oeuvre collective*," because personal contributions by authors had been merged into the whole).
58. France, Intellectual Property Code Art. L. 113-2, 113-5.
59. *See* §7.1, above.
60. *See* Skone James et al. 1991, §4-7.
61. Canada, Copyright Act §§2, 14(2).
62. U.S. 1976 Copyright Act §201(c).

generally start from the premise that copyright in works created in the course of employment vests in the employee-author, rather than in the employer, so that a transfer from the employee will be required for the employer to obtain copyright. The French Intellectual Property Code, for example, provides that the existence of an employment relationship will not derogate from the fundamental principle that copyright vests in a work's actual author.[63] Nonetheless, civil law countries will often imply into the employment agreement a transfer of copyright from the employed author to his employer.[64] For example, Spanish law provides that, unless a written employment contract states otherwise, the economic rights are presumed to be transferred to the employer, to the extent necessary for the exercise of the customary activity of the employer.[65]

In the case of computer software created under employment, the E.C. Computer Software Directive requires all E.U. Member States to allocate the exclusive economic rights to the programmer's employer.[66] Similar rules exist in other civil law jurisdictions, such as Japan,[67] while Italian law provides for similar treatment of photographic works made under employment or on commission.[68]

Common law countries generally provide that, absent an express agreement to the contrary, copyright in works created in the course of employment initially vests in the employer rather than the employee.[69] The British legislation provides that "[w]here a literary, dramatic, musical or artistic work, or a film, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary."[70] The Canadian legislation provides that where a work's author "was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright."[71] The Canadian legislation carves out a narrow privilege for contributions to newspapers, magazines, and similar periodicals where, absent agreement to the contrary, the author is deemed to reserve a right to restrain the work's publication other than as part of a newspaper, magazine,

63. *See, e.g.*, France, Intellectual Property Code. Art L. 111-1.
64. *See, e.g.*, Germany, Copyright Act Art. 43
65. Spain, Copyright Act Art. 51(1)–(3).
66. E.C. Software Directive Art. 2(3). *See, e.g.*, France, Intellectual Property Code Art. L. 113-9; Germany, Copyright Act Art. 69b.
67. Japan, Copyright Act Art. 15(2).
68. Italy, Copyright Act Art. 88.
69. *See, e.g.*, Canada, Copyright Act §12(3); United Kingdom, Copyright, Designs and Patents Act 1988 §11(2).
70. United Kingdom, Copyright, Designs and Patents Act 1988 §11(2).
71. Canada, Copyright Act §13(3).

or similar periodical.[72] Other common law countries, such as Australia and India, also carve out special treatment for journalists' contributions to newspapers and similar periodicals.[73]

The 1976 U.S. Copyright Act provides that "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."[74] The Act defines a "work made for hire" as either (1) "a work prepared by an employee within the scope of his or her employment" or (2) if the parties expressly agree in writing that the work is to be considered a work made for hire, "a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas."[75]

Under the first clause of the statutory definition, an employer's express or implied right to control a worker's preparation of the work in issue is the most important, albeit not the only, factor that courts weigh in determining whether the work was made for hire. The U.S. Supreme Court has ruled that several factors, none of them independently determinative, should guide inquiry into "the hiring party's right to control the manner and means by which the product is accomplished"—among them "the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."[76]

§7.5 Audiovisual Works (Including Cinematographic Works)

As collective projects that often implicate the contributions of several authors, motion pictures have presented a substantial challenge to the great majority

72. Canada, Copyright Act §13(3).
73. *See* Australia, Copyright Act §35; India, Copyright Act §17(a).
74. U.S. 1976 Copyright Act §201(b).
75. U.S. 1976 Copyright Act §101.
76. Community for Creative Non-Violence v. Reid, 490 U.S., 730, 751–52 (1988).

of legal systems that are committed to traditional civil law concepts of copyright ownership. A motion picture—in legal terminology, a "cinematographic work"[77] or "audiovisual work"[78]—will usually be a collaborative work,[79] combining the contributions of its coauthors into inseparable parts of a unitary whole. Measuring the term of copyright in a film by the joint lives of its several contributors may prove cumbersome, however, and obtaining the unanimous consent required for a film's exploitation may be both cumbersome and costly. Legislatures in both civil law and common law countries have dealt specially with motion pictures to meet the exigencies created by production on this scale.[80] The Berne Convention, Paris Text, has contributed a complex formula for allocating ownership that aims to facilitate exploitation of motion picture rights.[81]

§7.5.1 National Law

Most countries treat motion pictures as joint works but differ on which contributors are to be treated as the work's coauthors. All countries that take this approach characterize the film's director as at least a coauthor. The E.C. Term Directive provides that "[t]he principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors," and adds that "Member States shall be free to designate other co-authors."[82] The Directive measures the term of copyright from the death of the last to die of the following persons: "the principal director, the author of the screenplay, the author of the dialogues, and the composer of music specifically created for use in the cinematographic or audiovisual work."[83] However, the Directive does not designate any of these persons (except for the principal director) as coauthors.

The author of the screenplay and the composer of the soundtrack are regularly presumed to be coauthors in civil law jurisdictions.[84] For example, the

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77. *See, e.g.*, Berne Convention, Paris Text Art. 14*bis*.
78. The term "audiovisual work" is more encompassing. *See* France, Intellectual Property Code Art. L. 112-2(6), which categorizes as works of the mind within the meaning of the law: "cinematographic works and other works consisting of sequences of moving images, with or without sound, together referred to as audiovisual works."
79. *See* §7.2, above.
80. *See* §7.5.1, below.
81. *See* §7.5.2, below.
82. E.C. Term of Protection Directive Art. 2(1). *See also* E.C. Rental Right Directive Art. 2(2) and E.C. Satellite and Cable Directive Art. 1(5).
83. E.C. Term of Protection Directive Art. 2(2).
84. *See* European Commission, *Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the question of authorship of cinematographic or audiovisual works in the Community*, Brussels, December 6, 2002, COM(2002) 691 final.

French Intellectual Property Code establishes a presumption that the coauthors of a collaborative audiovisual work are the authors of the script, the adaptation, the dialogue, any musical composition specially composed for the work, and the director.[85] Spain, Italy, and Portugal designate even more precisely the authors of cinematographic or audiovisual works. These include the director, the authors of underlying works of literature (script, scenario, dialogue, adaptation), and the authors of the film music.[86] Less frequently characterized as coauthors are the cinematographer, set designer, film editor, and costume designer.[87]

Work for hire concepts often combine with joint work concepts in the ultimate determination of motion picture ownership. A film's coauthors will commonly transfer their ownership rights to the film's producer. If the contributors have not done so expressly, laws in many civil law countries will variously imply a transfer to the producer of at least the principal economic rights. The French Intellectual Property Code, for example, implies into the author-producer relationship a transfer of the main exploitation rights to the producer.[88] The German legislation operates to similar effect.[89] Most countries allow the coauthors and the producer to alter these contractual presumptions respecting assignment of rights. But however ownership interests may ultimately be allocated, the film itself remains a joint work. Its copyright term will be measured by reference to the life of the designated coauthors, and the scope of rights impliedly or expressly transferred will be traced to the conduct and status of each coauthor.

Rules differ from one civil law country to another on the presumptions of transfer that apply to different classes of coauthors and different types of works. Some countries apply the same presumptions of transfer across the board to all coauthors.[90] Others differentiate the presumption depending on the class of work into which the coauthor's contribution falls—treating music, say, differently from a scenario.[91] While such presumptions of transfer do not affect moral rights, as these are inalienable in civil law countries, the law often provides that moral rights may be exercised only in connection with the final work. France, which follows this view,[92] defines a film's final, definitive

85. France, Intellectual Property Code Art. L. 113-7. The provision adds that "[i]f an audiovisual work is adapted from a preexisting work or script which is still protected, the authors of the original work shall be assimilated to the authors of the new work."
86. *See* E.C. Report (*supra*), § IV.1.
87. *See generally* Bercovitz 1996, 225, 230–234; Marjut Salokannel, Ownership of Rights in Audiovisual Productions, A Comparative Study (1997).
88. *See* France, Intellectual Property Code Art. L. 132-24. *See also* Japan, Copyright Act Art. 15(1). *See generally* Bercovitz 1996, 225.
89. Germany, Copyright Act Art. 89(1).
90. *See, e.g.*, Italy, Copyright Act Art. 45; Spain, Copyright Act Art. 88(1).
91. *See, e.g.*, Netherlands, Copyright Act Art. 45d.
92. France, Intellectual Property Code Art. L. 121-5.

version (the so-called "final cut") as the version "established by common accord between the director, or, possibly, the joint authors, on the one hand, and the producer, on the other."[93] Other countries, including Germany, allow coauthors to exercise their moral rights at any time during both the production and subsequent exploitation of the work.[94]

Allocation of motion picture ownership interests to a single entity, typically the production company, is generally more straightforward in common law systems. The 1988 Copyright, Designs and Patents Act in the United Kingdom designates the party that undertakes the arrangements necessary for making the film as the film's author and initial copyright owner.[95] This will typically be the film's producer,[96] although the E.C. Term Directive has since required addition of the film's director as an author.[97] The U.S. Copyright Act even more completely finesses questions of transfer and ownership by designating the employer as a work's author in the case of works made for hire.[98] Motion pictures represent one of the limited classes of works that can be made a work for hire simply through the expedient of a written agreement stating that the work was made for hire.[99] In the absence of such a writing—or a true employment relationship—the motion picture will probably be considered a joint work.

§7.5.2 International Conventions

National differences in the allocation of film rights between coauthors *inter se*, and between coauthors and producers, introduce complications into worldwide motion picture distribution that contracts cannot always resolve. The rare film that is produced and distributed exclusively within the United States, for example, poses no special problems, since the U.S. work-for-hire doctrine will typically vest authorship as well as ownership in the film's producer.[100] But if authorship is determined under the law of the work's protecting country, and not the law of the country of origin or the law of the country with the most substantial contacts, the U.S. employer-production company may discover, when its film is distributed in France, that it owns less than the full bundle of copyright interests there.[101] Article 14*bis* of the Berne Convention

93. France, Intellectual Property Code Art. L. 121-5.
94. *See, e.g.*, Germany, Copyright Act Art. 42.
95. United Kingdom, Copyright, Designs and Patents Act 1988 §9(2)(a).
96. *See* Skone James et al., §4-55.
97. E.C. Term of Protection Directive Art. 2(1).
98. U.S. 1976 Copyright Act §201(b).
99. *See* §7.4, above.
100. *See* §7.4, above.
101. *See* §4.4.3, above.

and Article 19 of the Rome Convention attempt to harmonize the rules on ownership of film rights across countries.

§7.5.2.1 Berne Convention

Article 14*bis* of the Paris Text of the Berne Convention, a provision which Professor Ricketson has called "the most obscure and least useful in the whole Convention,"[102] was added at the Stockholm Revision Conference in 1967.[103] The provision attempts to achieve transnational harmony in the allocation of film rights by strengthening presumptions of assignment in those countries where they are weak. Article 14*bis* does this through a principle of legitimation, specifically providing that "[o]wnership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed,"[104] but adding that "in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work."[105]

National requirements differ on whether the author's "undertaking" must be in writing, and Article 14*bis*(2)(c) provides that "whether or not the form of the undertaking referred to above should, for the application of the preceding subparagraph (b), be in a written agreement or a written act of the same effect shall be a matter for the legislation of the country where the maker of the cinematographic work has his headquarters or habitual residence." It adds, "[h]owever, it shall be a matter for the legislation of the country of the Union where protection is claimed to provide that the said undertaking shall be in a written agreement or a written act of the same effect."[106]

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102. Ricketson 1987, 582.
103. Berne Convention, 1971 Paris Text Art. 14*bis*.
104. Berne Convention, 1971 Paris Text, Art. 14*bis*(2)(a).
"It is also emphasized that the presumption is governed by the fact that the author has consented, which is why it is not called a presumption of assignment but simply one of legitimation, since it in no way interfered with the contractual relations between contributors and film-makers, but merely deems the latter to have acquired the permission necessary to exploit the film." WIPO 1978, 86.
105. Berne Convention, 1971 Paris Text Art. 14*bis*(2)(b). *See* WIPO 1978, 86.
106. Berne Convention, 1971 Paris Text Art. 14*bis*(2)(c). Where a country's legislation does require a written agreement, the country must notify this to the Director General of the WIPO who in turn will notify all other countries of the Union (Art. 14*bis*(2)(c)).
The WIPO *Guide to the Berne Convention for the Protection of Literary and Artistic Works* (Paris Act, 1971) 87–88 (1978), provides an example: "[A] film-maker resident in the

Where Article 14*bis*(2) subjects a wide range of exploitation media to its presumption of legitimation,[107] Article 14*bis*(3) sharply limits the class of authors to which the presumption applies, so that unless the applicable national legislation provides to the contrary, "the provisions of paragraph (2)(b) above shall not be applicable to authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof."[108] Since, as Professor Ricketson notes, "this covers most of the principal persons who are regarded as authors of contributions under many national laws, only a residual category of authors will be covered by the presumption—for instance, the actors, the designers, the cameramen—insofar as these persons are regarded as co-authors by those laws."[109]

§7.5.2.2 Rome Convention

National law will generally not treat film actors and other performers as authors; their contributions to a film may, however, be protected under a theory of neighboring rights. Article 19 of the Rome Convention provides that "once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation," Article 7 of the Convention, prescribing the minimum protection to be given performers,[110] "shall have no further application."[111] According to the WIPO *Guide to the Rome Convention and the Phonograms Convention*, Article 19 implies that the performer "cannot prevent any use which is made of his fixed performance whether the fixation was intended for cinema showing or on television. For example, an actor plays a role in a film or television studio. His mere presence before the cameras means that he agrees to its being filmed for showing in cinemas or on the television screen as the case may be. The same is true of a musician who agrees to his playing being recorded for use on the film soundtrack. Once released, these performances can be put to uses the performers did not contemplate (e.g., by the insertion in other films or broadcasts; or the making of videograms to be

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Federal Republic of Germany (where a written consent is not required) may enjoy the benefit of this 'presumption of legitimation'; if the film is exploited in Sweden (another country in which writing is not demanded) the presumption applies; but if it is exported to France, and if this country has made the notification to the Director General mentioned above, the presumption has no effect unless there was a written contract in the Federal Republic of Germany, even if not required under German law. This makes it necessary for the maker, in his dealings with the various contributors to a film, to be aware of the legal situation in each country in which he hopes to exploit his film and, if necessary, to safeguard his position with a 'written agreement or a written act of the same effect.'" (citation omitted.)

107. *See* WIPO 1978, 86.
108. Berne Convention, 1971 Paris Text Art. 14*bis*(3).
109. Ricketson 1987, 583.
110. *See* §9.2.1, below.
111. Rome Convention Art. 19.

sold in commerce); neither actor nor musician can invoke the Convention to ensure payment for such uses."[112]

§7.6 Ownership by Transfer

The belief that principles of natural right exclusively define authors' rights in the civil law countries,[113] and that utilitarian principles exclusively define copyright in common law countries,[114] colors assumptions about copyright transfers as well: that paternalistic regulation pervades the transfer of rights in civil law countries and that freedom of contract is the exclusive norm in common law countries. In fact, neither assumption describes the rules governing transfer of rights any more accurately than it describes the rights themselves. To be sure, civil law countries do impose constraints on authors' contractual autonomy; but so do common law countries, although undoubtedly to a lesser extent. And just as freedom of contract underpins copyright transactions in common law countries, it is also the background rule to copyright transactions in civil law countries. The reasons for protecting authors in their contractual relations with publishers, broadcasters, and other intermediaries will vary with the legal regime that provides such protection. While notions of natural or social justice historically underlie the author-protective contract rules commonly found in civil law jurisdictions, more mundane rationales, such as the desire to protect authors against unfair terms in standard authors' contracts—in ways similar to consumer protection or labor law—are perhaps more forceful today.

At least as many differences exist in treatment of authors' contracts between countries following the civil law or common law tradition, as between the two traditions themselves. Legislation in the United Kingdom makes copyright fully "transmissible by assignment, by testamentary disposition or by operation of law, as personal or moveable property,"[115] and the Australian and Canadian Acts are similarly generous in allowing free assignment of copyright.[116] Yet, English courts have overturned, as unreasonable restraints of trade, contracts in which it was evident that the publisher overreached on an economically weaker author,[117] and the Canadian Act contains a provision, borrowed from a repealed British provision, that in situations where the

112. WIPO 1981, 65.
113. *See* §2.2, above.
114. *See* §2.1, above.
115. United Kingdom, Copyright, Designs and Patents Act 1988 §90(1).
116. Australia, Copyright Act §196(1); Canada, Copyright Act §12(4).
117. *See, e.g.*, Schroeder v. Macaulay, [1974] 3 All E.R. 616; Clifford Davis v. WEA Records, [1975] All E.R. 237; O'Sullivan v. Management Agency & Music, [1985] Q.B.428. *Cf.* Elton John v.

author, as the work's first copyright owner in the work, has made an *inter vivos* transfer of the copyright, or of an interest under the copyright, to another, the rights will revert to the author's estate 25 years after the author's death; the author cannot waive the reversionary right.[118]

The U.S. Copyright Act provides as a central rule that "ownership of copyright may be transferred in whole or in part by any means of conveyance, or by operation of law,"[119] but the Act nonetheless contains several rules that subordinate freedom of contract to a concern for author welfare. Some of these rules take the form of legal presumptions, for example the rule that, absent an express transfer of copyright in an author's contribution to a collective work, the copyright owner of the collective work acquires only the privilege of reproducing and distributing the contribution as part of the collective work or any revision or later work in the same series.[120] The U.S. Act also imposes absolute prohibitions on alienability. One such prohibition is its grant to authors of a nonwaivable power to terminate transfers 35 years after they are made;[121] another is the power to avoid involuntary transfers.[122] American rules on contract formalities[123] and contract construction[124] also tip the contractual scales in the author's favor.

§7.6.1 Limitations and Construction of Transfers

A 1991 study of national legislation on authors' rights in civil law countries revealed that "virtually all of them encompass the regulation of author's contracts."[125] According to the study's author, György Boytha, the more modern statutes regulate the field both extensively and variously: "the Italian Act of 1941, the French Act of 1957 contain more than 30 pertinent articles each, the German law (the Act of 1965 together with the rules on publishing contracts of 1901/1910 still maintained) about 60 such sections; the Portuguese Act of 1985 about 70, the Spanish Law of 1987 more than 50 relevant sections."[126] While these figures may no longer be accurate today, they do

James [1991], 18 F.S.R. 397, 449 (stating that a contract can be set aside when one party exerts a "dominating influence" that results in a "manifestly disadvantageous transaction").

118. Canada, Copyright Act §14(1). *See generally* §7.6.1.2, below.
119. U.S. 1976 Copyright Act §201(d)(1).
120. U.S. 1976 Copyright Act §201(c).
121. U.S, 1976 Copyright Act §203.
122. U.S. 1976 Copyright Act §201(e).
123. U.S. 1976 Copyright Act §204.
124. *See* §7.6.1.1, below.
125. Boytha 1991.
126. *Id.* at 199. *See also* Denis De Freitas, *Copyright Contracts: A Study of the Terms of Contracts for the Use of Works Protected by Copyright Under the Legal System in Common Law Countries*, 27 Copyright 222 (1991); Netanel 1994.

illustrate the complexities of dealing with authors' rights in various sectors of the media and entertainment industries. The French Act, for example, contains different chapters for publishing contracts, performance contracts, audiovisual production contracts, and contracts for commissioned advertising. Although certain ground rules (e.g., formal requirements and rules limiting the scope or construction of transfers) will be mandatory, many of these provisions merely serve as default rules and will most often be overridden in contractual practice. This is true as well for the 1901 German Publishing Act, relevant parts of which are still in force, and which in the absence of an express agreement between author and publisher will supply the pivotal terms of a publishing agreement. Nonetheless, courts in many if not most civil law countries will seek to ascertain, and to honor, the intentions of the contracting parties at the time they entered into their agreement, following in one form or another the theory, formalized in German law, of ultimate purpose (*Zweckübertragungstheorie*).[127]

The civil law tradition takes two approaches to alienability of authors' interests. The "dualist" approach, followed in France and most other civil law countries, treats author's right in a work as consisting of two separate elements—a pecuniary element, or economic right, and a reputational element, or moral right.[128] The economic right is freely transferable by the author. The moral right, by contrast, is in principle inalienable subject to certain expedient qualifications.[129]

The "monist" approach to author's rights, followed in Germany, Austria, and some other civil law countries, predicates that the author's economic and moral rights are thoroughly intertwined and that the economic aspect of the right inalienably adheres to the author no less than does the right's reputational aspect.[130] Where authors in dualist countries can exploit their economic interests in a work through the transfer of the economic rights, authors in monist countries, barred from assigning any of their rights, can accomplish the rough economic equivalent only through the grant of privileges to use the work (*Nutzungsrechte*) that approximate, but are not identical to, nonexclusive and exclusive licenses in civil or common law practice.[131]

The strictest limits on alienability, in both common law and civil law countries, are imposed on attempted transfers of the author's moral right. Although common law countries generally take a hands-off attitude to copyright

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127. *See generally* François Dessemontet, General Report, Proceedings of 1997 A.L.A.I. Conference 48, 52 (1998).
128. *See generally* Boytha 1991, 201–202; Netanel 1994, 13–17; Lucie Guibault, P. Bernt Hugenholtz et al., Study on the conditions applicable to contracts relating to intellectual property in the European Union (2002).
129. *See* §10.5.1, below.
130. *See, e.g.*, Germany, Copyright Act Art. 29; Austria, Copyright Act Art. 23(3).
131. Germany, Copyright Act Art. 31 (2)–(3).

transfers, those that have adopted a discrete moral rights provision generally prohibit their assignment;[132] some provision is made, however, for waiver.[133] The civil law countries constrain dispositions of moral right more stringently. The French legislation makes moral right "perpetual, inalienable and imprescriptible."[134] Even on the Continent, however, the bar on disposition is not absolute. As a practical matter, an author who contracts for his work's publication has effectively ceded to his publisher the important moral right of divulgation, or first publication. The German Act permits a licensed adapter of a work to make good faith changes in the work and its title "which the author cannot reasonably refuse."[135] Special provisions governing rights in contributions to cinematographic works give producers elbow room in altering, and timing the publication of, contributed material.[136]

Analysis of copyright transfers requires, first, a determination of the law that governs the particular aspect of the contract in issue. For example, formal requirements such as those imposed by the statute of frauds may be subject to the law of one country, while construction of the grant may be subject to the law of another country.[137] Next, the terms of the contract must be analyzed under the applicable law. Several issues recur in the construction of copyright contracts: the scope of use permitted;[138] the term, and possible termination, of the grant;[139] remuneration to the author;[140] rights granted respecting future works;[141] and special considerations affecting moral rights.[142] The formalities required for copyright transfers, including recordation, also sometimes require analysis.[143]

Legislative provisions on copyright contracts variously govern the legitimacy and construction of copyright transfers. Some legislation may entirely bar certain transfers. For example, Spanish law provides that "the transfer of exploitation rights shall not apply to methods of use or means of dissemination

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132. *See, e.g.*, United Kingdom, Copyright, Designs and Patents Act 1988 §94.
133. *See, e.g.*, United Kingdom, Copyright, Designs and Patents Act 1988 §87(2).
134. France, Intellectual Property Code Art. L. 121-1 ("It [right to respect for name, authorship and work] shall be perpetual inalienable and imprescriptible.")
135. Germany, Copyright Act Art. 39(2). *See also* France, "Le petit prince," Court of Cassation, June 12, 2001, 191 R.I.D.A. 266 (2002) (contract allowing animated film adaptation of Saint-Exupéry's work *The Little Prince* implies "a degree of freedom afforded to the adapter," moral rights notwithstanding).
136. *See* §7.5, above.
137. *See* §4.4.2, above.
138. *See* §7.6.1.1, below.
139. *See* §7.6.1.2, below.
140. *See* §7.6.1.3, below.
141. *See* §7.6.1.4, below.
142. *See* §10.5, below.
143. *See* §7.6.2.1, below.

that do not exist or are unknown at the time of the transfer."[144] Similarly, until its revocation in 2007, Article 31(4) of the German Copyright Act provided that the "grant of an exploitation right for as yet unknown types of use and any obligations in that respect shall have no legal effect."[145] Arguably, German law's general rule of equitable remuneration for each form of exploitation of a copyrighted work[146] made a complete ban on grants regarding future uses no longer necessary.

Another example is the rule, at least nominally followed in most countries with moral right protection, that moral right is inalienable.[147] Other provisions take the form of constructional presumptions and offer a default rule to be applied in the absence of an express agreement to the contrary. These constructional presumptions generally favor the author on the theory that he is the weaker party to the transaction.[148]

§7.6.1.1 Scope of Grant

Civil law countries have been more activist than common law countries in establishing presumptions and restrictions that limit the scope of use that a copyright contract entitles a copyright transferee to make. This tendency is particularly evident in countries like Germany that follow the monist tradition under which the author is, by definition, disabled from parting with his rights and can only parcel out privileges to his work.[149] Professor Eugen Ulmer's observation of some years ago remains accurate today: "The copyright, so to speak, tends to remain with the author as much as possible."[150] Where the grant of a use privilege does not expressly specify the particular use or uses intended, German courts will, under the "purpose of grant theory," interpret the grant in light of the contract's primary purpose and will place on

144. Spain, Copyright Act Art. 43(5).
145. Germany, Copyright Act Art. 31(4) (revoked). In one case, for example, the German Federal Court of Justice ruled that, for purposes of Article 31(4), videocassette exploitation of motion pictures was unknown at the time the contract in issue was executed, so that the heirs of the film's director retained the video rights in the work. *Videozweitauswertung* ("Secondary Exploitation on Video"), German Federal Supreme Court, October 11, 1990, Case No. I ZR 59/89, 22 I.I.C. 574 (1991). Article 31(4) was revoked in the course of the "Second Basket" revision of German copyright law in 2007. *See* A. Vahrenwald, *Amendments to the German Copyright Act in January 2008*, 19 Entertainment Law Review, Issue no. 2 (2008), 18–19.
146. *See* §7.6.1, below.
147. *See* §10.5, below.
148. *See* Boytha 1991, 202.
149. *See* §7.6.1, above.
150. Ulmer 1976, 216.

the transferee the burden of proving that the proposed use comes within the intended purpose.[151]

Article 31(5) of the German Act, as modified in 2007, codifies the "purpose of grant" rule as follows: "If the types of use to which the exploitation right extends have not been specifically designated when the right was granted, the scope of the exploitation right shall be determined in accordance with the purpose envisaged in making the grant. Appropriate factors to consider for the question of whether a right to use is granted, is whether it concerns a simple or exclusive right to use, the extent of the right to use and the right to prohibit, and what restrictions affect the right to use."[152] Accordingly, if the contractual terms do not specifically enumerate the uses for which the rights are transferred, the author will not be deemed to have granted more extensive rights than would be required by the purpose pursued by the transfer at issue. A similar but less elaborate rule exists in the Netherlands.[153]

In countries following the dualist tradition, such as France, Spain, and Belgium, a similar result is achieved by way of a rule of "specification," which invalidates transfers that do not set out explicitly, for each mode of exploitation, the author's remuneration, the geographical scope, and the duration of the assignment.[154] The French legislation does however permit the express grant of a right to exploit the work through media that did not exist at the time the contract was executed, on the condition that the contract provide for "participation correlated to the profits from exploitation" through the new medium.[155]

Most American courts will construe ambiguous language in a copyright contract to favor the author. For example, courts almost universally hold that an author who transfers his initial term of copyright will effectively retain his right to the renewal term in the absence of an express conveyance of the interest to his transferee.[156] American courts also employ presumptions in favor of authors and against drafters in determining whether a grant of rights to exploit a work in one existing medium includes the right to exploit it in another existing medium.[157] However, courts have drawn few bright lines to

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151. Germany, Copyright Act Art. 31(5).

152. Germany, Copyright Act Art. 31(5). *See, e.g.*, Germany, Spiegel CD-Rom, Federal Supreme Court, July 5, 2001, Case I ZR 311/98, 34 I.I.C. 119 (2003) (license to publish photos in magazine *Der Spiegel* does not cover CD-ROM compilation).

153. Netherlands, Copyright Act Art. 2(2).

154. France, Intellectual Property Code Art. L. 131-3. Spain, Copyright Act Art. 43(1); Belgium, Copyright Act Art. 3(1)(4). *See, e.g.*, France, Cercle d'Art v. Picasso estate, Court of Cassation, January 23, 2001, 189 R.I.D.A. 326 (2001) (assignment of reproduction rights in Picasso drawings held to be null and void absent clause specifying duration and extent of assignment of rights).

155. France, Intellectual Property Code Art. L. 131-6.

156. *See generally* Goldstein 1996, §4.6.3.5.

157. *See* Goldstein 2005, §5.3.2.1.

aid in determining whether a new medium of exploitation, not expressly mentioned in a copyright license, falls within the scope of the grant. Courts have, for example, held that transfer of the right to exhibit motion pictures in theaters includes the right to exhibit them over television,[158] even though television was unknown at the time of the grant, but that the right to exhibit over television does not include the right to distribute videocassettes, similarly unknown at the time of the grant.[159]

The most striking exception to the constructional preference for authors under American jurisprudence is the rule that, in case of doubt respecting the nature of the interest conveyed, the copyright owner will be deemed to have transferred the more extensive right. Thus, if there is a question whether the parties contemplated an assignment of the entire copyright or only some lesser interest, typically an exclusive license, courts will generally find an assignment.[160] Similarly, when it is clear that a license was intended but it is uncertain whether the parties intended the license to be exclusive or nonexclusive, courts will generally resolve the doubt in favor of an exclusive license.[161]

§7.6.1.2 Term and Termination of Grant

Some copyright legislation in Europe empowers authors to terminate a transfer when the published work no longer reflects their views. Associated with doctrines of moral right, this right of withdrawal is typically subject to the author's obligation to indemnify his transferee for any harm suffered.[162] Entirely apart from moral right, the Italian Act imposes a twenty-year ceiling on publishing contracts.[163] Other legislation makes the transfer of an interest contingent on the transferee's timely exploitation of the interest and gives the author the power to recapture the interest after a specified time. Under the German Act, for example, two years after granting an exploitation right, or delivering the work, whichever is later, the author can revoke the grant if the grantee's nonexercise has seriously harmed the author's lawful interests.[164]

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158. *See, e.g.*, Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150 (2d Cir.), *cert. denied*, 393 U.S. 826 (1968). *See also* Boosey & Hawkes Music Publishers, Ltd. v. The Walt Disney Co., 145 F.3d 481 (2d Cir. 1998).
159. *See, e.g.*, Rey v. Lafferty, 990 F.2d 1379, 1390 (1st Cir. 1993).
160. *See, e.g.*, Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F.2d 306, 311, (2d Cir.), *cert. denied*, 308 U.S. 597 (1939).
161. *See, e.g.*, Hubbard Broadcasting, Inc. v. Southern Satellite Sys., Inc., 593 F. Supp. 808, 810–811, (D Minn. 1984), *aff'd*, 777 F.2d 393, (8th Cir. 1985), *cert. denied*, 479 U.S. 1005 (1986).
162. *See* §10.4, below.
163. Italy, Copyright Act Art. 122.
164. Germany, Copyright Act Art. 41.

Common law countries have adopted contract termination rules but, unlike the civil law countries, have not made them contingent on changed conditions or the grantee's failure to exploit the work. A Canadian provision, modeled on the reversion provisions of the 1911 English Act, provides for a nonwaivable reversion to the author's estate, 25 years after the author's death, of any copyrights transferred by the author in his lifetime.[165] For the provision to apply, the author has to be the first owner of copyright, and the work cannot be a collective work or a contribution to a collective work. The United Kingdom has long since dropped the 1911 Act's reversionary provision, although the provision retains retrospective force for transfers made before 1957 of rights in works created before 1957.[166]

The 1976 U.S. Copyright Act introduced the termination of transfer concept into U.S. copyright law through parallel provisions governing transfers executed on or after January 1, 1978, and transfers executed before that date. For grants executed on or after January 1, 1978, section 203 of the 1976 Act gives authors and their statutory successors the right to terminate a grant at any time during a five-year period that begins to run thirty-five years after the grant's execution. For grants of renewal term interests executed before January 1, 1978, section 304(c) gives authors and their statutory successors the right to terminate the grant at any time during a five-year period that begins on January 1, 1978, or fifty-six years after the date statutory copyright was originally secured, whichever is later. Section 304(d), added to the 1976 Act by copyright term extension amendments in 1998, provides that, in the case of works still in their renewal term on the amendments' effective date, October 27, 1998, authors or successors who failed to terminate a transfer within the period prescribed by section 304(c) can capture the twenty-year extension by exercising a new termination right at any time during a five-year period beginning at the end of seventy-five years from the date copyright was originally secured.

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165. Canada, Copyright Act 14(1).

166. *See* Laddie et al. 2000, §23.28. The proviso to §5(2) of the 1911 Act creating the reversionary right read:

> where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) after the passing of this Act, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void, but nothing in this proviso shall be construed as applying to the assignment of the copyright in a collective work or a license to publish a work or part of a work as part of a collective work.

The U.S. termination right does not apply to works made for hire. The right is not transferable or waivable, but neither section 203 nor section 304(c) prevents the parties to a grant from agreeing that the author will have the right to terminate at an earlier time. The Act carves out a limited exception for derivative works from the termination right, allowing a derivative work prepared under authority of the grant before its termination to "continue to be utilized under the terms of the grant after its termination."[167] Because the termination right is a rule of copyright—not contract—law, the termination of a copyright transfer will have no effect on rights outside the United States.[168]

§7.6.1.3 Remuneration

A concern for the position of authors has spurred some civil law, but not common law, countries to regulate the remuneration clauses in copyright contracts. The French legislation, for example, prohibits lump sum payments in all but a limited number of situations and requires instead that the author participate proportionally, through royalties, in the work's revenues.[169] The French legislation does not, however, seek to regulate the royalty rate itself. The German Act gives the author the nonwaivable right to seek reformation of the copyright contract if the revenues produced by the work's exploitation are grossly disproportionate to the agreed-upon remuneration—the so-called "bestseller clause."[170] However, until recently, even civil law jurisdictions avoided actually prescribing a fair reward for authors. This reluctance came to an end with the German "Law to strengthen the contractual position of authors and performing artists" of 2002.[171] Article 32 of the amended German Copyright Act, entitled "Equitable Remuneration,"[172] establishes a general rule of equitable remuneration for authors and performers: "For the grant of exploitation rights and permission to use a work the author is entitled to the remuneration contractually agreed. If the rate of remuneration is not settled, the remuneration shall be at an equitable level. If the agreed remuneration is not equitable, the author may require from his

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167. U.S. 1976 Copyright Act §203(b)(1).
168. *See* §4.1.2, above.
169. France, Intellectual Property Code Art. L. 131-4.
170. Germany, Copyright Act Art. 32a. *See, e.g.*, *Kinderhörspiele*, German Federal Supreme Court, June 21, 2001, Case I ZR 245/ 98, *cited in* Dietz 2003 at 204 (lump sum fee amounting to 0.7 percent of gross receipts of DM 5.5 million considered disproportionally low; royalty adjusted to 5 percent).
171. *Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern*, Deutscher Bundestag, BGBl I, No. 21, March 28, 2002, p. 1155. *See* Dietz 2003; text of relevant articles, *id.* at 230.
172. The German law uses the term "*eine angemessene Vergütung*," literally meaning "appropriate reward."

contracting partner assent to alter the contract so that the author is assured an equitable remuneration."[173] The new law establishes a presumption according to which a remuneration fixed by a common remuneration standard, to be collectively negotiated, is deemed equitable.[174] Article 32a makes the right to equitable remuneration guaranteed under German law invulnerable to contractual choices of law.[175]

§7.6.1.4 Rights to Future Works

The civil law's regard for the author's intimate relationship with his work has produced legislation that to varying degrees curtails the author's power to transfer rights in his future works.

The Spanish Copyright Act generally voids all such transfers of future rights in publishing contracts.[176] Belgian legislation validates assignments of economic rights in future works, but only for specified works and for a limited time.[177] French law voids open-ended assignments of rights in future works[178] but will permit more closely cabined transfers—for example, in book publishing, if the character, quantity, or timing of the work is specifically limited.[179] The German Act allows a grant of rights in future works of defined character but provides that the clause may be terminated by either party five years after the contract's execution.[180] Common law countries such as the United States, the United Kingdom, and Canada generally place no bar on the transfer of rights in future works.

§7.6.2 Formalities and Priorities

§7.6.2.1 Formalities

Legislation in common law countries generally requires a written instrument, signed by the grantor, to effect a transfer of copyright or of an exclusive license under a copyright.[181] As a rule, nonexclusive licenses do not have

173. Germany, Copyright Act Art. 32(1).
174. Germany, Copyright Act Art. 32(2).
175. Germany, Copyright Act Art. 32b. *See* A. Peukert, *Protection of Authors and Performing Artists in International Law—Considering the Example of Claims for Equitable Remuneration Under German and Italian Copyright Law,* 35 I.I.C. 900 (2004).
176. Spain, Copyright Act Art. 43(3).
177. Belgium, Copyright Act Art. 3 §2.
178. France, Intellectual Property Code Art. L. 131-1.
179. France, Intellectual Property Code Art. L. 132-4.
180. Germany, Copyright Act Art. 40(1).
181. *See, e.g.*, United Kingdom, Copyright, Designs and Patents Act 1988 §90(3); Australia, Copyright Act §196(3); Canada, Copyright Act §13(4); U.S. 1976 Copyright Act §204(a).

to be in writing.[182] Common law countries also regularly imply nonexclusive copyright licenses into circumstances revealing the copyright owner's intention to permit a particular use.[183] As a rule, however, they will not imply any transfer of a copyright interest into a transfer of the copy, phonorecord, or other material support embodying the copyrighted work.[184]

In civil law countries, the formal requirements for transfer of authors' rights vary from country to country. These countries generally require the existence of a written instrument for an assignment of rights, while licenses are subjected to fewer formalities, or none at all. These writing requirements sometimes serve as a condition of validity of the transfer of rights[185] but more often serve merely as a means to prove the transfer.[186] Other countries, such as France, require written instruments for the transfer of specific rights such as publication and performance, or production or adaptation into an audiovisual work,[187] while leaving other transfers free from formalities. German law sets no formal requirement for the validity or the evidence of a transfer of rights, except for grants of rights in future works, which need to be in writing.[188] Italy requires recordation of the transfer in the public registers maintained by the "Public Registry of Protected Works" in Italy.[189] As in the common law countries, no inference of transfer of a copyright interest will as a rule be drawn from the transfer of the material support embodying the copyrighted work.[190]

Choice of law rules generally look to the law of the country in which the contract was made to provide the applicable rules on statute of frauds and other copyright contracts formalities.[191] This fact, and the fact that most international copyright contracts with economic consequence will expressly designate the law that governs the contract, make the variety of national approaches to formal contract questions less of an obstacle to international transactions than would otherwise be the case.

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182. *See, e.g.*, Canada, Copyright Act §12(4). In the United States and the United Kingdom, the absence of a writing requirement can be negatively inferred from the statutory language requiring a writing only for transfers of ownership interests.
183. *See, e.g.*, Nelson v. Rye & Cocteau Records Ltd. [1996] 2 All E.R. 186, 1 WLR 1378; Oddo v. Ries, 743 F.2d 630, 634 (9th Cir. 1984).
184. *See*, *e.g.*, U.S. 1976 Copyright Act §202.
185. *See, e.g.*, Netherlands, Copyright Act Art. 2(2).
186. *See, e.g.*, Belgium, Copyright Act Art. 3(1)(2).
187. France, Intellectual Property Code Art. L. 131-2.
188. Germany, Copyright Act Art. 40(1).
189. Italy, Copyright Act Art. 104.
190. *See, e.g.*, France, Intellectual Property Code Art. L. 111-3.
191. *See* §4.4.2, above.

§7.6.2.2 Priorities

Questions of "priority" sometimes arise between competing transferees of the same copyright interest. For example, a motion picture producer may borrow money from *A* to produce a film, and secure his promise to repay the loan by granting *A* an interest, called a security interest, in the film's copyright. If the producer subsequently borrows additional funds for the film from *B*, similarly granting *B* a security interest in the film's copyright, it will sometimes happen that the film produces insufficient revenues to pay off both loans. In that event, the question inevitably arises as to which lender—*A* or *B*—has the first claim on the film and its revenues. Priority rules operate to resolve this conflict.

Unlike contract formalities, the ordering of priorities between competing transferees to the same copyright interest cannot be resolved by a contract's governing law clause[192] or by a copyright owner's recordation of his interest in a single country.[193] Priorities will inevitably be resolved on a country-by-country basis. From a transactional perspective, the problem with priorities arises not so much from the variety in national approaches as it does from the general absence of systematic methods for recording transfers and establishing priorities between competing claimants to the same interest. Within the civil law world, the most sustained effort at establishing recording systems for transfer of copyright interests has been in the field of audiovisual works, as evidenced, for example, by the French *Centre national de la cinématographie*[194] and the sparsely subscribed Treaty on the International Registration of Audiovisual Works.[195]

The principle of first in time, first in right generally governs the determination of priorities between conflicting copyright transfers in common and civil law countries. In civil law jurisdictions these issues will mostly be governed by general rules of private law. By contrast, some common law countries have special copyright rules in place. The United Kingdom follows the same common law priority that has long been established for transfers of real property interests: the first transferee of an interest from a licensor will prevail over a second transferee of the same interest, unless the second transferee is a *bona fide* purchaser for value, without actual or constructive notice of the prior transfer.[196] The Canadian Copyright Act follows the principle of British law of first in time, first in right, subject to requirements of good faith, valuable

192. *See* §4.4.3, above.
193. *See* Eugen Ulmer, Intellectual Property and the Conflict of Laws: A Study Carried Out for the Commission of the European Communities, Directorate-General for Internal Market and Industrial Affairs (1978).
194. Centre national de la cinématographie (CNC), *see* http://www.cnc.fr.
195. Treaty on the International Registration of Audiovisual Works (Geneva, 1989).
196. United Kingdom, Copyright, Designs and Patents Act 1988 §90(4).

consideration, and lack of notice, providing that "[a]ny assignment of copyright, or any license granting an interest in a copyright, shall be adjudged void against any subsequent assignee or licensee for valuable consideration without actual notice, unless the prior assignment or license is registered in the manner prescribed by this Act before the registering of the instrument under which the subsequent assignee or licensee claims."[197]

The U.S. Copyright Act establishes different priority rules depending on whether the dispute is between two or more conflicting transfers of copyright ownership (including exclusive licenses), or between a transfer of ownership and a nonexclusive license.[198] Section 205(d) of the 1976 Act provides that, where there are two conflicting transfers of copyright ownership, for the later transferee to prevail over the first transferee it must show that the later transfer was obtained in good faith and without notice of the first transfer, that it was made for valuable consideration or on the basis of a binding obligation to pay royalties, and that it was recorded in the U.S. Copyright Office before the first transfer was recorded. Further, the later transferee must show that the first transfer was not "recorded, in the manner required to give constructive notice . . . within one month after its execution in the United States or within two months after its execution outside the United States."

Section 205(e) governs priorities between transfers of ownership and nonexclusive licenses. Section 205(e) provides that "[a] nonexclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or such owner's duly authorized agent, and if (1) the license was taken before execution of the transfer; or (2) the license was taken in good faith before recordation of the transfer and without notice of it." Section 205(e) differs in three important respects from section 205(d). First, a transfer of ownership that is recorded before the execution of a subsequent nonexclusive license will prevail over the license even though the instrument of transfer is not recorded in the manner required to give constructive notice under section 205(c). Second, unlike an ownership transferee, a nonexclusive licensee does not have to record its interest to be protected against either a prior or subsequent ownership transferee. Third, unlike a subsequent ownership transferee, a nonexclusive licensee does not have to give valuable consideration or a binding promise to pay royalties to be protected.

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197. Canada, Copyright Act §57(3).

198. The priority and recording rules prescribed by section 205 of the 1976 Copyright Act govern only transfers made on or after January 1, 1978, the Act's effective date. The priority and recording rules of the 1909 Copyright Act govern transfers executed before January 1, 1978, and differ in important respects from those of the 1976 Act.

§7.6.3 Collective Rights Management

Copyright collecting organizations exist in civil law as well as common law countries and in developing as well as developed economies. From the beginning, the impetus to the formation of collecting societies has been the difficulty of enforcing author's rights and copyright against such decentralized uses as nondramatic performances of musical compositions. As emerging technologies have introduced newer forms of decentralized use, new collecting societies have formed to enforce copyright against these uses.[199] It is no exaggeration to say that, for each right they administer, these societies have, through their reciprocal relations with counterpart societies throughout the world, created their own private law of copyright relations.

The history of collecting societies traces to the late eighteenth century with the organization in France of a collecting agency for authors that ultimately evolved into SACD, the Société des Auteurs et Compositeurs Dramatiques. The next major step came a half century later, again in France, with the organization of SACEM, the Société des Auteurs, Compositeurs et Editeurs de Musique, to license, collect, and distribute revenues under the musical performance right. Today, 150 years later, SACEM remains "one of the strongest and most prosperous organizations in the world in the field of collective administration of authors' rights."[200] Although collecting societies have since proliferated to administer a wide variety of rights under copyright and author's right, the musical performing rights societies have remained the most numerous and probably the most powerful in their impact on the formation of copyright policy, domestically and internationally.

In patterns that vary from one country to another, collecting societies have been formed to license exploitation not only of dramatic, literary, and musical works, but also of visual art, choreography, and phonograms. Along with the performance right, these licenses may encompass *droit de suite*, graphic reproduction, photocopying, public lending, mechanical reproduction, cable retransmission, and digital archiving rights.[201] In some cases, a rights collecting organization will confine itself to a single right, as does Finland's KOPIOSTO, which administers the photocopying right for literary works. In other cases, the organization will oversee a wide array of rights in several types of subject matter, as does Belgium's SABAM, which administers performance, reproduction, cable transmission rights, and *droit de suite* in literary,

199. For general background on rights collecting societies, see Ficsor 1985; Sinacore-Guinn 1993; Gervais 2006.

200. Ficsor 1985, 343. *See generally* Sinacore-Guinn 1993, 80–88.

201. For an inventory of collecting rights societies, and their operation in the European countries, see Appendix 1 to Michael J. Freegard, *Collective Administration: The Relationship Between Authors' Organizations and Users of Works*, 21 Copyright 443 (1985).

dramatic, plastic, photographic, and audiovisual works. Some societies perform the full complement of services—licensing uses, pursuing unlicensed uses, collecting revenues, and distributing royalties—while others perform more restricted services.

At the international level, most collecting organizations are affiliated with one of four umbrella organizations. The largest is CISAC, the Confédération Internationale des Sociétés d'Auteurs et Compositeurs, which has ties with over 140 collecting organizations representing a wide range of copyrighted works. BIEM, the Bureau International des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique, is affiliated with organizations that administer recording and mechanical reproduction rights. IFPI, the International Federation of Phonogram and Videogram Producers, is the principal international trade association of phonogram and videogram producers and also helps to coordinate the activities of collecting societies in the fields of neighboring rights in phonograms and videograms. IFFRO, the International Federation of Reproduction Rights Organizations, coordinates the activities of national collecting organizations in administering reprographic rights.

Collective rights societies require licenses, partial assignments or mandates (powers of attorney) from adhering authors and right holders. For collective rights management to be effective it is important that the societies represent all, or at least a large number of, right holders in a given category. In some countries legislatures offer collecting societies legal support to accomplish this. In the Nordic countries, for example, licensing agreements concluded between collecting societies and institutional users may be "extended" to cover (local or foreign) right holders that are not represented by the society.[202] Such nonrepresented right holders may, however, elect to opt out of the agreement. A comparable mechanism is compulsory collective rights management, which is prescribed in the E.C. Satellite and Cable Directive.[203] Accordingly, right holders must channel their cable retransmission rights through a collective rights management organization and may not exercise these rights individually. In many countries collecting societies operate on the basis of a legal or de facto monopoly. In such cases courts will sometimes assume that the collecting society has a sufficient legal mandate, requiring users to provide express evidence that works used by them without permission of the society are *not* included in the society's repertoire.[204]

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202. *See* Tarja Koskinen-Olsson, *in* Gervais 2006, 263.
203. *See* §9.1.4.4, below.
204. In Germany this rule-of-thumb is known as the "GEMA-*Vermutung*" ("GEMA assumption"), which has some support in case law; *see, e.g.*, BGH GRUR 1986, 66—GEMA-Vermutung II; BGH ZUM 1988, 199—GEMA-Vermutung III.

Reciprocal representation agreements provide the economic link between a collecting organization in one country and its counterparts in other countries.[205] Under these agreements, each society undertakes to represent in its own country all the works in the library of the other. Professor Gunnar Karnell has observed that a fundamental provision in most of these cross-national agreements is that in each country all holders of rights, regardless of the organization to which they belong, are treated in exactly the same way. "Thus, the organizations apply the national treatment principle proclaimed by both the Berne Convention and the Universal Copyright Convention."[206]

205. This description of international collective administration organizations is drawn in part from Sinacore-Guinn 1993, 657–660, as is the analysis of reciprocal representation agreements in the text paragraph that follows, from pages 645–646.

206. Gunnar Karnell, *The Relations Between Authors and Organizations Administering Their Rights*, 22 Copyright 45, 49 (1986).

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CHAPTER
8

Term of Protection

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There is no universal copyright term, even among the countries of the Berne Union, where the Convention's prescription, "life of the author and fifty years after his death," is a floor, not a ceiling to duration of protection.[1] Because the Convention's minimum term has changed over the course of the twentieth century, ascertaining the term applicable to an older work sometimes requires an archeological dig into the treaty relations between the work's country of origin and the country in which protection is sought.[2] Even contemporary works may present complications for determining the applicable term. The work may be one for which the Berne Convention accepts a shorter than standard term, or one for which the protecting country provides a longer than standard term,[3] and the rule of comparison of terms may require application of the term prescribed in the country of origin rather than the term prescribed in the protecting country.[4] Rules on retroactivity will sometimes fill in gaps in terms.[5]

Changes in national law, like changes in treaty minimum terms, can affect the determination whether, and to what extent, a particular work is protected by copyright. U.S. law provides an example. The 1909 U.S. Copyright Act prescribed a term of protection measured by 28 years from the date of the work's publication, with an optional renewal term of 28 years.[6] When the 1976 Copyright Act prospectively altered the general term of copyright to the Berne minimum of the author's life and 50 years, it retrospectively extended the term of copyright in works still in their first term by enlarging the renewal term to 47 years; in the case of works already in their renewal term, the Act effectively added 19 years to the renewal term.[7] Similarly, when the 1976 Act was amended in 1998 to add 20 years to the basic copyright terms,[8] any work that was not in the public domain on the amendments' effective date obtained the benefit of the extension. So, for example, a copyright that was originally secured under the 1909 Act and that had its term extended to 75 years by the 1976 Act will (unless and until the copyright term is extended again) enjoy protection for 95 years from its date of first publication.

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1. Berne Convention, 1971 Paris Text Art. 7(1).
2. On how complex the determination of term may become, see John N. Adams & Michael Edenborough, *The Duration of Copyright in the United Kingdom after the 1995 Regulations*, 11 E.I.P.R. 590 (1996).
3. *See* §8.1, below.
4. *See* §8.3, below.
5. *See* §8.4, below.
6. U.S. 1909 Copyright Act §24.
7. U.S. 1976 Copyright Act §304(a)(b).
8. Pub. L. No. 105-298, 112 Stat. 2827 (1998).

§8.1 Copyright

§8.1.1 Traditional Literary and Artistic Works

As a rule, treaty provisions on minimum copyright term do not differentiate between economic rights and moral rights in literary works. Article 6*bis*(2) of the Berne Convention, Paris Act, is an exception in its provision that the rights of paternity and integrity secured by Article 6*bis*(1) shall, after the author's death, "be maintained, at least until the expiry of the economic rights."[9] Legislation in common law countries and countries following the German monist tradition similarly do not differentiate for purposes of term between economic rights and moral rights, making the two sets of rights coterminous.[10] By contrast, France, which follows the dualist tradition, measures economic rights by the author's life and a fixed period of years and makes moral rights perpetual.[11] The Netherlands, another dualist country, measures economic rights by the same yardstick (life plus seventy years), as harmonized by the E.C. Term of Protection Directive,[12] but makes moral rights expire with the death of the author, unless the author designated a person to exercise his moral rights in his last will or in a codicil thereto.[13]

Moral rights in the United States, to the extent that they exist, receive a fixed term of protection or potentially perpetual protection, depending on whether they are being protected under the Copyright Act—through the derivative right, for example—or under trademark and unfair competition law prohibitions against misrepresentation.[14]

§8.1.1.1 Individual Works

Legislation in most countries prescribes a term of protection for individually authored works measured by the author's life followed by a fixed period. Since the 1908 Berlin Text, the minimum term prescribed for all members of

9. Article 6*bis*(2) further provides: "However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraphs may provide that some of these rights may, after his death, cease to be maintained."
10. *See, e.g.*, United Kingdom, Copyright, Designs and Patents Act 1988 §12; Germany, Copyright Act Art. 64(1).
11. France, Intellectual Property Code Arts. L.121-1, L.123-1. *But see Les Misérables*, Court of Cassation, 30 January 2007, 212 R.I.D.A. 248 (2007), *discussed in* Benabou 2008, 196–204 (unauthorized sequels to work of Victor Hugo not deemed to infringe perpetual moral right of integrity, since right of adaptation had expired).
12. E.C. Term of Protection Directive Art. 1(1).
13. Netherlands, Copyright Act Art. 25(2).
14. *See* §10.2, below.

the Berne Union has been "the life of the author and fifty years after his death."[15] The E.C. Term Directive requires a term measured by the author's life and seventy years after his death.[16] As a general rule, Australia now prescribes a term of seventy years *post mortem auctoris* (*p.m.a.*).[17]

Following the European example, the United States in 1998 extended the general term of copyright from fifty years to seventy years following the death of the author.[18] In the case of works that were unpublished on January 1, 1978, the effective date of the 1976 Copyright Act, the term of copyright will be the standard term of author's life and seventy years.[19] To account for works by authors long since dead, the U.S. Act further provides that "in no case, however, shall the term of copyright in such a work expire before December 31, 2002; and if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047."[20] Canada continues to prescribe a general copyright term of fifty years *p.m.a.*,[21] and since 1992 India has prescribed a term of sixty years *p.m.a.*[22]

The Universal Copyright Convention follows continental practice by using the author's life as the benchmark for measuring the duration of copyright, prescribing a minimum term of the author's life and 25 years after his death.[23] But the U.C.C. also provides an alternative aimed at accommodating U.S. practice before passage of the 1976 U.S. Copyright Act: "Any Contracting State which, upon the effective date of this Convention in that State, does not compute the term of protection upon the basis of the life of the author, shall be entitled to compute the term of protection from the date of the first publication of the work or from its registration prior to publication, as the case may be, provided the term of protection shall not be less than twenty-five years from the date of first publication or from its registration prior to publication, as the case may be."[24]

In situations where copyright initially vests in a corporate entity, the term of protection will typically be measured by a benchmark other than the life of a natural person. Article 12 of the TRIPs Agreement provides that "[w]henever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than fifty years from the end of the calendar

15. Berne Convention, 1971 Paris Text Art. 7(1).
16. E.C. Term of Protection Directive Art. 1(1).
17. Australia, Copyright Act §33(2).
18. U.S. 1976 Copyright Act §302(a).
19. U.S. 1976 Copyright Act §303(a).
20. U.S. 1976 Copyright Act §303(a).
21. Canada, Copyright Act §6.
22. India, Copyright Act §22.
23. Universal Copyright Convention, 1971 Paris Text Art. IV(2)(a).
24. Universal Copyright Convention, 1971 Paris Text Art. IV(2)(b).

year of authorized publication, or, failing such authorized publication within fifty years from the making of the work, fifty years from the end of the calendar year of making."[25]

The United Kingdom legislation makes copyright in a computer-generated work expire after fifty years from the end of the calendar year in which the work was made.[26] In the case of works made for hire under the U.S. Copyright Act, the term of protection is 95 years from the year of the work's first publication, or 120 years from its creation, whichever expires first.[27] This term applies even when the employer is a natural, rather than a corporate, person.

§8.1.1.2 Collective and Joint Works

Because collective works such as anthologies and encyclopedias consist of discrete copyrightable elements, the contribution of each author will as a rule receive its own copyright term. Under Article 7 of the Berne Paris Text, the term of protection for each contribution will be measured by a minimum of its author's life and fifty years following his death. Similarly, the original expression represented by the editor's selection and organization of the individual contributions into a copyrightable collective work will receive a term of protection measured by a minimum of fifty years following the death of the editor.[28] Most national copyright legislation follows this approach, ascribing independent terms of protection to each copyrightable contribution, including the editorial contribution for selecting and arranging the elements of the collective work. Similarly, under Article 1(5) of the E.C. Term of Protection Directive, "[w]here a work is published in volumes, parts, installments, issues or episodes and the term of protection runs from the time when the work was lawfully made available to the public, the term of protection shall run for each such item separately."[29]

Under Article 1(4) of the E.C. Term Directive, when a member state "provides for particular provisions on copyright in respect of collective works or for a legal person to be designated as the rightholder," the term of protection is to be calculated as it is for anonymous and pseudonymous works, unless "the natural persons who have created the work are identified as such in the

25. TRIPs Agreement Art. 12. The E.C. Term of Protection Directive Art. 1(6) provides: "In the case of works for which the term of protection is not calculated from the death of the author or authors and which have not been lawfully made available to the public within seventy years from their creation, the protection shall terminate."
26. United Kingdom, Copyright, Designs and Patents Act 1988 §12(3). Section 163(3) of the U.K. legislation prescribes the terms of protection for Crown copyright.
27. U.S. 1976 Copyright Act §302(c).
28. *See* §§ 6.1.2.7 and 7.3, above.
29. E.C. Term of Protection Directive Art. 1(5).

versions of the work which are made available to the public."[30] Accordingly the French legislation, which allows copyright in a collective work (*oeuvre collective*) to vest in a corporate entity,[31] measures the term of economic rights in these works as seventy years from the beginning of the year following the year of publication.[32] Similar terms exist in the Netherlands, a rare case of a civil law country that designates legal persons as original authors.[33]

In the case of joint works,[34] Article 7*bis* of the Berne Paris Text requires that terms measured under Article 7 "from the death of the author shall be calculated from the death of the last surviving author."[35] Several countries have made special provision for measuring the term of copyright in cinematographic and other audiovisual works, which characteristically represent joint, collaborative endeavors.[36] Cinematographic works in the United States may constitute joint works but are more regularly structured as works made for hire. Consequently, they are in the usual case entitled to protection for 95 years from the date of publication.[37]

§8.1.1.3 Anonymous and Pseudonymous Works

Article 7(3) of the Berne Paris Text states the general rule that "[i]n the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public." The provision makes two exceptions, requiring application of Article 7(1)'s minimum life-plus-fifty term either when "the pseudonym adopted by the author leaves no doubt as to his identity," or "[i]f the author of an anonymous or pseudonymous work discloses his identity during the above-mentioned period." Article 7(3) adds that "[t]he countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years."[38] The E.C. Term Directive prescribes a term of seventy years from publication for anonymous and pseudonymous works,[39] and Article 1(6) of the Directive terminates protection for these works seventy years from their creation if not published within this period.[40]

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30. E.C. Term of Protection Directive Art. 1(4).
31. France, Intellectual Property Code Arts. L. 113-2, 113-5. *See* §7.3, above.
32. France, Intellectual Property Code Art. L. 123-3.
33. Netherlands, Copyright Act Art. 38 (2). *See* §7.1, above.
34. *See* §7.2, above.
35. Berne Convention, 1971 Paris Text Art. 7*bis*.
36. *See* §8.1.2.1, below.
37. U.S. 1976 Copyright Act §302(c).
38. Berne Convention, 1971 Paris Text Art. 7(3).
39. E.C. Term of Protection Directive Art. 1(3).
40. E.C. Term of Protection Directive Art. 1(6).

The U.S. Copyright Act provides that "[i]n the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of creation, whichever expires first."[41] If, before the expiration of the special term of protection for an anonymous or pseudonymous work, Copyright Office records reveal the identity of one or more of the work's authors, copyright in the work will last for the standard term.[42] The Australian Copyright Act protects anonymous and pseudonymous works for seventy years from the end of the calendar year of the work's first publication,[43] and the Canadian Copyright Act protects these works for fifty years from the work's first publication or seventy-five years from its making, whichever is less;[44] in both countries, the ordinary term—seventy years and fifty years *p.m.a.*, respectively—will apply if, during the specially prescribed period, the author's identity becomes known.

§8.1.2 Special Classes of Works

§8.1.2.1 Cinematographic Works

Under Article 7(2) of the Berne Convention, Paris Text, member countries may elect between two alternative formulas for calculating the minimum term of protection for cinematographic works: they "may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author"—typically by theatrical or other public release—"or, failing such an event within fifty years from the making of such a work, fifty years after the making."[45]

The E.C. Term Directive adopts a method for computing the term of copyright in cinematographic or audiovisual works that follows the author's right tradition by connecting term of protection to the lives of the work's authors: "The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work."[46] The provision controls only the computation of term and does not

41. U.S. 1976 Copyright Act §302(c).
42. U.S. 1976 Copyright Act §302(c).
43. Australia, Copyright Act §34.
44. Canada, Copyright Act §6.1.
45. Berne Convention, 1971 Paris Text Art. 7(2).
46. E.C. Term of Protection Directive Art. 2(2).

affect the determination of authorship or ownership of rights in these works.[47] So, for example, if the composer of a film's background score were the last of the designated contributors to die, the motion picture's term of copyright would expire seventy years after his death even though, under national law, the composer had no authorship or copyright interest in the work.

§8.1.2.2 Photographs and Works of Applied Art

Photographic works receive widely varying terms of protection around the world. At one end of the spectrum, the Universal Copyright Convention provides for a minimum ten-year term "in those Contracting States which protect photographic works."[48] Article 7(4) of the Berne Convention, introduced by the 1967 Stockholm Revision, establishes a minimum term of protection lasting "at least until the end of a period of twenty-five years from the making of such a work."[49] At the other end of the range, Article 9 of the WIPO Copyright Treaty effectively requires that photographic works receive Berne's minimum life-plus-fifty term by providing that "[i]n respect of photographic works, the Contracting Parties shall not apply the provision of Article 7(4) of the Berne Convention."[50] Article 12 of the TRIPs Agreement expressly excludes photographic works, along with works of applied art, from its provision that, whenever the term of protection of a work is calculated on a basis other than the life of a natural person, the term shall be no less than fifty years from the year of publication.

As evidence that the Berne Convention has done little to introduce uniformity into the national terms of copyright for photographs, Professor Ricketson cites the wide range of approaches that member states have taken to the question of term for this class of works, ranging from terms as short as five years in countries bound only by Acts prior to the Stockholm Revision, to twenty-five to fifty years after the work's making or after publication in a majority of countries bound by the Stockholm Text.[51]

The E.C. Term Directive has secured substantial uniformity in the European Union by extending the standard life-and-seventy-year term to photographs "which are original in the sense that they are the author's own

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47. *See* §7.5, above.
48. Universal Copyright Convention, 1971 Paris Text Art. IV(3). This provision also establishes a ten-year minimum term for "works of applied art in so far as they are protected as artistic works."
49. Berne Convention, 1971 Paris Text Art. 7(4). This provision also established the minimum term for "works of applied art in so far as they are protected as artistic works."
50. WIPO Copyright Treaty Art. 9.
51. Ricketson 1987, 338.

intellectual creation."[52] The same provision of the Term Directive allows member states to "provide for the protection of other photographs," that is nonoriginal photographs.[53] The German Act, for example, protects a simple snapshot under a neighboring right for a term of fifty years from its first publication or, if unpublished, from the year it was made.[54] The British legislation, by contrast, follows the common law tradition generally and assigns the life-plus-seventy-year term to all forms of photographs, whether fine art or snapshot.

§8.2 Neighboring Rights

Article 14 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations adopts a comprehensive twenty-year minimum period of protection but provides different starting points for computing the term for different classes of subject matter. In the case of phonograms and performances incorporated in phonograms, the minimum period is twenty years computed from the end of the year in which the fixation was made.[55] For performances that are not fixed—that is, not incorporated in phonograms—the term runs from the end of the year in which the performance took place.[56] For broadcasts, the term runs from the end of the year in which the broadcast occurred.[57] Following the historical trend to longer terms, the TRIPs Agreement provides that the term of protection for performers and producers of phonograms "shall last at least until the end of a period of fifty years computed from the end of the calendar year in which the fixation was made or the performance took place."[58] However, the TRIPs Agreement retains the Rome Convention minimum of twenty years for broadcasts.[59]

Article 4 of the Geneva Phonograms Convention leaves duration of protection to the domestic law of each contracting state, subject to the important exception that "if the domestic law prescribes a specific duration for the

52. E.C. Term of Protection Directive Art. 6. Recital 16 of the Directive states that "[a] photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account."
53. E.C. Term of Protection Directive Art. 6.
54. Germany, Copyright Act Art. 72.
55. Rome Convention Art. 14(a).
56. Rome Convention Art. 14(b).
57. Rome Convention Art. 14 (c).
58. TRIPs Agreement Art. 14(5). *See also* WIPO Performances and Phonograms Treaty Art. 17.
59. TRIPs Agreement Art. 14(5).

protection, that duration shall not be less than twenty years from the end either of the year in which the sounds embodied in the phonogram were first fixed or of the year in which the phonogram was first published."[60] Countries that meet their obligations under the Phonograms Convention through unfair competition law, which prescribes no fixed duration for the defendant's civil wrong, will typically specify no fixed period of protection outside the statute of limitations. According to the WIPO *Guide to the Rome Convention and to the Phonograms Convention*, it was evidently assumed that parity between national systems could best be maintained by the principle that protection should not end before twenty years from the phonogram's first fixation or first publication.[61]

Under the E.C. Term Directive, performers' rights expire fifty years after the date of the performance; "[h]owever, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier."[62] The rights of phonogram producers expire fifty years after the fixation is made or, if the phonogram is lawfully published during this period, fifty years from the date of the first publication.[63] The Directive provides a similar term for the neighboring rights of film producers.[64] The rights of broadcasting organizations expire fifty years after the broadcast's first transmission, whether the broadcast is transmitted by wire or over the air, including by cable or satellite.[65]

The E.C. Database Directive provides a two-tier regime: copyright protection for those elements, if any, that are protected by copyright, and a *sui generis* right (database right) for elements reflecting substantial investment. Copyrighted aspects of databases receive the same term of protection as copyrighted works generally.[66] By contrast, the contents of databases that come within the *sui generis* right enjoy a term of protection that expires 15 years from the first day of the year following the date of completion of the making of the database.[67] As a practical matter, so long as the database is regularly refreshed with new data, protection will be perpetual since, under Article 10(3), "[a]ny substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new

60. Geneva Phonograms Convention Art. 4.
61. WIPO 1981, 103.
62. E.C. Term of Protection Directive Art. 3(1).
63. E.C. Term of Protection Directive Art. 3(2).
64. E.C. Term of Protection Directive Art. 3(3).
65. E.C. Term of Protection Directive Art. 3(4).
66. *See* §8.1.1, above.
67. E.C. Database Directive Art. 10(1).

investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection."[68]

In the United States, sound recordings and other fixed performances, such as broadcasts, are protected under copyright rather than separate neighboring rights legislation and consequently enjoy the same term of protection as other forms of copyright subject matter. These works are frequently created under conditions that make them works for hire, protected for 95 years from the date of publication or 120 years from the date of creation, whichever expires first.[69] Unfixed performances are protected under state common law as well as state and federal antibootlegging legislation; the length of protection in these cases is at least potentially perpetual.[70] Canada protects sound recordings for fifty years from the end of the calendar year in which the recording was first fixed,[71] and broadcasts for fifty years from the end of the year in which the broadcast was made.[72]

§8.3 Comparison of Terms

§8.3.1 Berne Convention

The Berne Convention generally operates on the principle of national treatment, under which a foreign copyright claimant will receive in the protecting country the same treatment the country gives to its own nationals.[73] One important exception to national treatment is the rule of comparison of terms—also called the rule of the shorter term—embodied in Article 7(8) of the 1971 Paris Text: "In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in

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68. E.C. Database Directive Art. 10(3).
69. U.S. 1976 Copyright Act §302(c).
70. *See generally* Goldstein 2005, §17.6. The federal antibootlegging legislation appears at 17 United States Code Chap. 11 (2006).
71. Canada, Copyright Act §23(1)(b).
72. Canada, Copyright Act §23(1)(c).
73. *See* §4.2, above. *See also* Berne Convention, 1971 Paris Text Art. 7(7):

    Those countries of the Union bound by the Rome Act of this Convention which grant, in their national legislation in force at the time of signature of the present Act, shorter terms of protection than those provided for in the preceding paragraphs shall have the right to maintain such terms when ratifying or acceding to the present Act.

    According to the WIPO *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*, "[t]his is an exception for a few Union countries. It was inserted in the Convention at the Stockholm Revision (1967), confirmed by the Paris Revision (1971), to allow them to accept the new text of Article 7." WIPO 1978, 50.

the country of origin of the work."[74] The E.C. Term Directive obligates member countries to apply the rule of comparison of terms to non-European works;[75] however, the principle of nondiscrimination enshrined in the E.C. Treaty prevents member states from applying such rule to right holders of E.U. citizenship.[76] The United States and, with limited exceptions,[77] Canada do not compare terms, but Australia and India do.[78] The United Kingdom, before it passed amendments implementing the E.C. Term Directive, similarly refrained from comparison of terms.

§8.3.1.1 Scope

Article 7(8) presumably embraces all situations in which the term of protection given to nationals in the protecting country exceeds the term prescribed in the country of origin. The provision not only covers situations where the protecting country, such as Germany, gives a term of seventy years after the author's death and the country of origin grants a term measured by the Berne minimum, but it also encompasses more particularized differences, such as where one country protects works of applied art for twenty-five years from their making, as is permitted under Article 7(4) of the Berne Paris Act, and the other country grants them a full copyright term of fifty or seventy years after the author's death.[79]

The term fixed for protection in the country of origin will not always be self-evident. For example, under U.S. law, works created before January 1, 1978, were subject to an initial term of copyright, measured by 28 years from the date of publication, and to a second term of copyright—originally 28 years and at present 67 years—upon compliance with a renewal registration formality. (Amendments to the 1976 Copyright Act lifted the renewal registration formality in 1992.) Is the American copyright term in these works 28 years, as measured by the initial copyright term, or is it 95 years, as measured by the addition of the renewal term? Article 7(8)'s provision on comparison of terms is not the only provision of the Berne Convention that bears on the question; Article 18, making the Convention's obligations apply to any work that has not fallen into the public domain in its country of origin through expiry of the terms of protection, is also pertinent.[80]

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74. Berne Convention, 1971 Paris Text Art. 7(8).
75. *See* §8.3.3, below.
76. Phil Collins v. Imtrat, ECJ October 20, 1993, joined cases C-92/92 and C-326/92, ECR [1993] I-5145; *see* §3.3.1, above and §8.3.3, below.
77. Canada, Copyright Act §§5(1.02), 9(2).
78. Australia, Copyright (International Protection) Regulations 1969, Statutory Rules 1969 No. 60 as amended, Reg. 5; India, International Copyright Order §7.
79. WIPO 1978, 50.
80. On Article 18(1) and retroactivity, see §8.4, below.

In an "informal view," triggered by an inquiry from the United States, the Deputy Director General of the World Intellectual Property Organization opined on this and a corresponding question respecting works originating in the United States that, because of noncompliance with publication formalities,[81] had immediately fallen into the public domain. In the case of "those works which, due to the non-compliance with formalities (such as the requirement of publication with notice), have never been protected, it is clear that they 'have not [yet] fallen into the public domain . . . through the expiry of the term of protection' since there has been no term of protection applicable for them."[82]

The Deputy Director General further opined that where it was noncompliance with another formality—renewal registration—that placed the work in the public domain following its first term of protection, "the term 'fixed in the country of origin of the work' should be considered that term which would be applicable provided that the formalities would have been fulfilled (or would not have existed)"—95 years from publication—"[t]his is the term which should be taken into account by the other countries party to the Berne Convention and/or Members of the WTO when they apply the principle of 'comparison of terms' provided for in Article 7(8) of the Berne Convention."[83]

§8.3.1.2 Country of Origin

A work's country of origin for purposes of applying comparison of terms will not necessarily be the same as the country that provides the point of attachment for purposes of obtaining protection within the Berne Union.[84] The most common point of attachment under the Berne Paris Text is the country of the author's nationality. By contrast, it is the country in which the work was first published, and not the country of which the author is a national, that is the country of origin for published works under Article 7(8). To be sure, in many if not most cases the country of the author's nationality will also be the country of the work's first publication. However, if an author creates several works, each of which is first published in a different country, each work will have a different country of origin. One consequence of this difference is that authors and publishers may strategically select the place of first publication with an eye to the country that will provide the longest term of protection under Article 7(8)'s comparison of terms.

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81. *See* §6.1.4.2, above.
82. Letter of Shozo Uemura, Deputy Director General, World Intellectual Property Organization, *reprinted in* 46 J. Copr. Soc'y 91, 93 (1999).
83. *Id*. at 96.
84. *See* §5.1.2, above.

Article 5(4) roughly divides its ascription of country of origin between works that are published in a Berne Union country and works that are unpublished or are first published outside the Union. In the case of works first published in a country of the Union, the country of origin is considered to be that country. In "the case of works published simultaneously in several countries of the Union which grant different terms of protection," the country of origin is "the country whose legislation grants the shortest term of protection."[85] For works published simultaneously in a country outside the Union and in a country of the Union, the Union country is the country of origin.[86] In the case of unpublished works, or works first published in a country outside the Union without simultaneous publication in a country of the Union, the country of origin is as a general rule the country of the Union of which the author is a national.[87] Article 5(4)(c) carves out two exceptions to this rule: "(i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and (ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country."[88]

§8.3.2 Universal Copyright Convention

The Universal Copyright Convention's version of the rule of comparison of terms, Article IV(4)–(6) of the 1971 Paris Text, divides between published and unpublished works: "No Contracting State shall be obliged to grant protection to a work for a period longer than that fixed for the class of works to which the work in question belongs, in the case of unpublished works by the law of the Contracting State of which the author is a national, and in the case of published works by the law of the Contracting State in which the work has been first published."[89]

U.C.C. Article IV(5) provides that, for purposes of Article IV(4), "the work of a national of a Contracting State, first published in a non-Contracting State, shall be treated as though first published in the Contracting State of which the author is a national,"[90] and Article IV(6) adds that "in case of simultaneous publication in two or more Contracting States, the work shall be treated

85. Berne Convention, 1971 Paris Text Art. 5(4)(a). On the rules governing simultaneous publication, see §5.1.2.2, above. *See also* WIPO 1978, 36.
86. Berne Convention, 1971 Paris Text Art. 5(4)(b).
87. Berne Convention, 1971 Paris Text Art. 5(4)(c).
88. Berne Convention, 1971 Paris Text Art. 5(4)(c)(i),(ii).
89. Universal Copyright Convention, 1971 Paris Text Art. IV(4)(a).
90. Universal Copyright Convention, 1971 Paris Text Art. IV(5).

as though first published in the State which affords the shortest term; any work published in two or more Contracting States within thirty days of its first publication shall be considered as having been published simultaneously in said Contracting States."[91]

Comparison of terms under the U.C.C. and Berne differs in several significant respects. While Article 7(8) of the Berne Convention makes application of the rule obligatory unless national legislation provides to the contrary,[92] the U.C.C. employs the equivocal phrase, "[n]o Contracting state shall be obliged," raising the question of what state action, if any, is required to manifest a country's intention on the point.[93] As Dr. Bogsch observed, "[o]ne could argue that since the Convention does not provide that a country may 'cut back' by its law or other enacted rule, a country may 'cut back' in any manner it pleases, i.e., even by remaining silent."[94] But Dr. Bogsch added, "[o]ne could also argue that, from a practical viewpoint, unless the will of the country is expressed in the form of a general rule, the owners of copyright and the prospective users are left in such an uncertainty as to their rights and obligations which would be repugnant to common sense. Consequently, this argument would conclude, countries wishing to make use of the permissive rule of Article IV, paragraph 4, must enact general rules to this effect."[95]

Unlike the Berne Convention, the U.C.C. provision on comparison of terms grapples directly with the question of how to count consecutive terms of copyright, as under the since-abandoned U.S. system of two 28-year terms with the second term conditioned on compliance with a renewal formality. For purposes of U.C.C. Article IV(4)(a), "if the law of any Contracting State grants two or more successive terms of protection, the period of protection of that State shall be considered to be the aggregate of those terms. However, if a specified work is not protected by such State during the second or any subsequent term for any reason, the other Contracting States shall not be obliged to protect it during the second or any subsequent term."[96]

Where comparison of terms under the Berne Convention centers on the term for the particular work in issue, comparison under the U.C.C. focuses on the term fixed "for the class of works to which the work in question belongs."[97] As a consequence, comparison of terms requires, first, a determination of the term of protection the protecting country would give to the work in issue if the work had been created by one of the protecting country's own nationals; second, determination of the class to which the relevant

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91. Universal Copyright Convention, 1971 Paris Text Art. IV(6).
92. *See* §8.3.1, above.
93. Universal Copyright Convention, 1971 Paris Text Art. IV(4)(a).
94. Bogsch 1968, 53.
95. Bogsch 1968, 53.
96. Universal Copyright Convention, 1971 Paris Text Art. IV(4)(b).
97. Universal Copyright Convention, 1971 Paris Text Art. IV(4)(a).

contracting state—the country of first publication for published works, the country of the author's nationality for unpublished works—assigns the work; and, third, determination of the term that country assigns to that class of works. If this latter term is shorter than the term prescribed by national treatment, the protecting country may apply the shorter term to the work in issue.[98]

§8.3.3 E.C. Term Directive

The E.C. Term Directive, as implemented in member states, categorically obligates member countries to apply the rule of comparison of terms to foreign works of non-European provenance.[99] The Term Directive also requires comparison of terms for neighboring rights. If the foreign work qualifies for protection in the E.U. country, "the term of protection granted by Member States shall expire no later than the date of expiry of the protection granted in the country of which the rightholder is a national."[100] At least arguably, the Directive exempts earlier international agreements, such as the 1892 U.S.-German bilateral treaty,[101] from the effect of its mandatory comparison of terms.[102]

Prior to adoption of the Directive, terms of protection varied considerably from country to country in the European Union, and member states routinely applied the rule of comparison of terms between each other. While most countries offered the Berne Convention minimum of fifty years after the death of the author, the term of protection in Germany was life plus seventy years, and in Spain was sixty years after the author's death. In France musical works without words benefited from a special term of life plus seventy years. In addition, several countries provided for extensions for copyright terms that would otherwise have expired during the world wars. In France the term of protection was extended for a further term of thirty years if the author, the

98. *See generally* Bogsch 1968, 54. ("Naturally, if the duration under (iii) is zero—i.e., when the class is not protected by copyright in the work's country of origin—the country in which protection is sought is free to deny protection to the work even if, under this latter country's law, works of the class to which the particular work belongs enjoy protection.")
99. E.C. Term of Protection Directive Art. 7(1).
100. E.C. Term of Protection Directive Art. 7(2).
101. On the effect of the U.S.-German Agreement on term of copyright in works of U.S. origin, see §3.1.5.2, above.
102. *See* E.C. Term of Protection Directive Art. 7(3): "Member States which, on October 1993, in particular pursuant to their international obligations, granted a longer term of protection than that which would result from the provisions of paragraphs 1 and 2 may maintain this protection until the conclusion of international agreements on the term of protection of copyright or related rights."

composer, or the artist died for France ("*mort pour la France*").[103] However, coinciding with the adoption of the Directive in 1993, the European Court of Justice in its landmark *Phil Collins* decision made clear that the E.C. Treaty's ban on discrimination on the basis of nationality (Article 12) required complete national treatment between the member states[104] and would no longer allow a comparison of terms.

Works created after the effective date of the Term Directive's implementing legislation will receive a uniform term of protection across the European Union.[105] Article 10(2) of the Directive also mandates retrospective harmonization measures for works created by E.U. nationals, or first published in an E.U. country, before the effective date of the Directive's implementing legislation. Under Article 10(2), the terms of protection provided for in the Directive are to apply "to all works and subject matter which were protected in at least one Member State" on July 1, 1995.[106] So for example, as of July 1, 1995, a German work whose author died in 1944 was still protected in Germany, where the term of protection was life and seventy years, but was in the public domain in the United Kingdom where the term was life plus fifty years. By contrast, a UK work whose author had died in the same year would be in the public domain in both countries, due to the operation of the rule of comparison of terms. However, because after *Phil Collins* a comparison of terms was no longer allowed, all works created by E.U. citizens were protected for seventy years after the author's death in Germany on July 1, 1995. Article 10(2) would therefore revive the UK copyright in both works—and, indeed, any other lapsed copyrights throughout the Union[107]—and have it last until

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103. France, Intellectual Property Code L. 123-10. The war extensions have come to an end with the transposition of the Directive in French law. *See* Société des Auteurs dans les arts graphiques et plastiques ADAGP v. Société Editions Fernand Hazan SA et al., Court of Cassation, February 27, 2007, 212 R.I.D.A. (286) 2007 (holding that the E.C. Term of Protection Directive, while harmonizing the term of protection across the E.U., has factored in preexisting war extensions, and therefore does not allow further wartime extensions for works of Monet). *See* Benabou 2008, 210–214. However, the Directive does not curtail any terms still running on July 1, 1995 (E.C. Term Directive Art. 10(1)). In Italy the Peace Treaty of 1947 has extended the term of protection in favor of authors of the allied nations; these extensions still apply. *See* M. Fabiani, *News from Italy*, 212 R.I.D.A 2007, 136.
104. Phil Collins v. Imtrat, ECJ October 20, 1993, joined cases C-92/92 and C-326/92, ECR [1993] I-5145; *see* §§ 3.3.1 and 8.3.1, above. *See also* Land Hessen v. Ricordi, ECJ June 6, 2002, case C-360/00 ECR [2002] I-5089 (holding that the prohibition of discrimination also applies to cases where the author had died before the E.C. Treaty entered into force).
105. Although the Directive does not allow longer terms than those set in the Directive, terms already running on July 1, 1995, in a member state are not shortened in that member state. E.C. Term of Protection Directive Art. 10(1).
106. E.C. Term of Protection Directive Art. 10(2).
107. *See* Herman Cohen Jehoram, *The E.C. Copyright Directives, Economics and Authors' Rights*, 25 I.I.C. 821, 835 (1994). *See also* Gerald Dworkin & J.A.L. Sterling, *Phil Collins and the Term Directive*, 16. E.I.P.R. 187, 189 (1994).

2014, seventy years after the author's death. Because this provision effectively revives lapsed copyrights, Article 10(3) accommodates the interests of third parties, such as translators, who invested in reliance on the copyright's lapsed status. The Directive has effectively resulted in a large-scale revival of copyrights in those member states that formerly granted a term of fifty years after the author's death. The Directive, however, fails to designate the beneficiaries of revival: the heirs of the author, or the last person to own the copyright prior to its original expiry. Member states have dealt with this issue in different ways.[108]

Extension of the standard American copyright term to the author's life and seventy years will not necessarily immunize works made for hire from a comparison of terms in European countries. Where the work for hire is a collective work, such as an encyclopedia, comparison of terms may not be an issue, since the term for these works under the Directive will in many if not most cases be seventy years from publication,[109] while the American term for works for hire is ninety-five years from publication or one hundred twenty years from creation, whichever expires first.[110] Other works for hire, however, such as motion pictures originating in the United States, may have their term shortened under the Directive, since legislation adopted under the Term Directive treats motion pictures as joint works whose term expires seventy years after the death of the director, writer, or composer, whichever survives longest—a term that may substantially exceed the American term for works made for hire.[111]

§8.4 Retroactivity

Article 18 of the Berne Paris Text, incorporated by reference into the TRIPs Agreement,[112] obligates member states to retroactively protect foreign works already in existence at the time the work's country of origin first adhered to the Convention.[113] The rule traces to the very first text of the Convention whose drafters understood that, without a requirement of retroactive protection, only works that were created after the Convention's entry into force would enjoy protection in other countries, with the result that a vast body of works would remain unprotected outside their country of origin. Neither the Universal Copyright Convention nor the Rome Convention contains a comparable provision on retroactivity.[114] The TRIPs Agreement prescribes

108. Visser *in* Dreier & Hugenholtz 2006, Term Directive, Art. 10 note 2(c).
109. E.C. Term of Protection Directive Art. 1(4).
110. U.S. 1976 Copyright Act §302(c).
111. *See* §8.1.2.1, above.
112. TRIPs Agreement Art. 9(1).
113. Berne Convention, 1971 Paris Text Art. 18.
114. *See* Rome Convention Art. 20(2).

retroactive protection of sound recordings through its requirement in Article 14(6) that "the provisions of Article 18 of the Berne Convention (1971) shall also apply, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms."[115]

Berne Articles 18(1) and (2) cover works in existence at the time the Convention came into force, presumably in any one of its Acts,[116] and require retroactive protection if the work has not fallen into the public domain through "expiry of the term of protection" in the work's country of origin or in the protecting country.[117] The requirement applies to unpublished works as well as to published works, and to works that may have fallen into the public domain in the country of origin, the protecting country, or both countries for some reason other than expiration of term; noncompliance with formalities is the most common reason. Article 18(3) of the Berne Convention gives member countries considerable leeway to meliorate any prejudice suffered by users when a work they correctly believed was in the public domain is restored to copyright.

Article 18(4) of the Paris Text makes paragraphs (1)–(3) apply not only "at the moment of its [the Convention's] coming into force," but also "in the case of new accessions to the Union." The differences in approach to the question of retroactivity in the United States following its adherence to the Paris Text in 1989 indicate the occasional complexity of the question. Was the United States obligated to protect Berne Union works that lost their copyright because of the copyright owner's failure to renew copyright for the second 28-year term? Under one view, the loss of copyright in this situation arose from expiration of term—the original 28-year copyright term.[118] Under another view, the loss arose from noncompliance with a formality—registration for renewal. The questions have since been resolved by amendments to the U.S. Copyright Act in 1994 restoring copyright in works coming from Berne Union and World Trade Organization countries, where copyright had been lost for noncompliance with formalities such as renewal registration as well as for other reasons.[119]

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115. TRIPs Agreement Art. 14(6).
116. On the analytical problems created by the phrase, "at the moment of its coming into force," particularly in the case of states that have adhered to an earlier, but not a later, Act, see Ricketson 1987, 672–673.
117. On the definition of country of origin, see §8.3.1.2, above.
118. The latter position coincides in principle with the rationale behind the renewal term in U.S. copyright law, that it is a "separate estate," and independent of the original term of copyright.

    See generally, Arpad Bogsch, *WIPO Views of Article 18*, 43 J. Copr. Soc'y U.S.A. 181 (1995); Irwin Karp, *Final Report, Berne Article 18 Study on Retroactive United States Copyright Protection for Berne and Other Works*, 20 Colum.-V.L.A. J. Law & Arts 157 (1996).
119. *See* §5.6.1.3, above.

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CHAPTER
9

Economic Rights

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Rights, particularly economic rights, in literary and artistic works have expanded over the course of a century to bring new technological uses of literary and artistic works within copyright control. In 1886, when the Berne Convention was promulgated, the reproduction right was evidently so well established that it did not need to be stated as a minimum treaty standard.[1] The 1886 Berne Text only required member countries to grant exclusive rights to translate and to publicly perform translated works. Revisions between the Berne Text and the 1971 Paris Text subsequently added guarantees for new rights, such as broadcasting and mechanical reproductions of musical works, in response to the emergence of new distribution technologies. The reproduction right was not added as a norm until 1967 at Stockholm. In December 1996, the WIPO Copyright and Performances and Phonograms Treaties introduced minimum standards for an exclusive distribution right[2] and for an encompassing right of communication to the public, the first time either right was formulated as an international treaty norm.[3] At the same time that exclusive rights have expanded, so have the limitations on rights, in the form of statutory licenses and exemptions from liability, prescribed by national legislation.[4]

The distribution and communication rights introduced by the WIPO Treaties have legal precedents in national copyright practice, but another innovation of the two treaties does not: the requirement that contracting parties provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights."[5] The treaty requirement for anti-circumvention measures, though clearly motivated by the concern that digital technologies will erode copyright markets, should not be mistaken for a minimum copyright standard. Other than its inclusion in the text of a copyright and a neighboring rights treaty, the anti-circumvention requirement has no connection—indeed is antithetical—to the philosophy of copyright generally, that privately enforced rights mediate more efficiently and equitably between authors and their audiences than do physical or technological fences.[6]

Economic rights in creative products divide between those conferred by copyright or author's right and those conferred by neighboring rights. The lines of division are not universal. One country may treat a recorded

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1. *See* §9.1.1, below.
2. *See* §9.1.2, below.
3. *See* §9.1.4.5, below.
4. *See* Chapter 11, below.
5. WIPO Copyright Treaty Art 11.

   Article 18 of the WIPO Performances and Phonograms Treaty makes comparable provision for technological measures used by performers or phonograms producers.
6. *See generally* Goldstein 1997; Thomas Vinje 1996.

performance as a work entitled to copyright protection, while another country will exclude recordings from authorial "works" and protect them only under one or more neighboring rights.[7] Also, countries may take different approaches to the rights that attach to literary and artistic works. Most countries give no right against library lending of literary works. Of the countries that do prescribe a public lending right, such as the Member States of the European Union, some, like Germany, France, and the Netherlands, treat it as an author's right,[8] while others, like the United Kingdom, subject it to special laws outside the context of copyright.[9] These differences raise the vexing question whether treaty requirements of national treatment obligate Country *A*, which for its own nationals treats a right as belonging to copyright or author's right, to extend the same treatment to nationals of Country *B*, even though Country *B* would characterize the right as a neighboring right for purposes of its own nationals and nationals of Country *A*.[10]

Courts around the world apply virtually the same rules to determine whether one work infringes rights in another. Apart from the commonplace that literal identity between two works will almost invariably imply infringement, courts in both civil law and common law jurisdictions apply the idea-expression distinction to determine whether a defendant has unlawfully appropriated protected content from the copyrighted work. The TRIPs Agreement enshrines the idea-expression distinction in Article 9(2): "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."[11] This universal position reflects an understanding that all cultures advance by drawing on the achievements of their predecessors, and that if literature and art are to thrive, the building blocks of expression must always be free for borrowing.

Another controlling factor in infringement determinations is the level of the copyrighted work's originality.[12] The more original and creative a work is, the more robust its scope of protection will be. Consequently, factual works, such as maps and business forms, which by their nature leave little room for an author's original contribution, will enjoy protection only against literal, or close to literal, copying.

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7. *See* §6.2.2, above.
8. *See* §9.1.2.3, below.
9. European Commission, Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the public lending right in the European Union, Brussels, COM(2002) 502 final.
10. *See* §4.2.3, above.
11. TRIPs Agreement Art. 9(2). *See also* WIPO Copyright Treaty Art. 2.
12. *See* §6.1.1, above.

To prevail in an infringement action, a copyright owner must prove, first, that the defendant copied from its work either consciously or subconsciously,[13] and, second, that the copying appropriated protectible expression; copying of unprotectible ideas or nonoriginal expression, however studied it may be, does not constitute copyright infringement. Striking similarities between two works—the same idiosyncratic phrase in two musical works, or common errors such as false entries in competing directories—may support an inference of copying on the ground that two works would be unlikely to share such similarities unless one had copied from the other.[14] In some cases, similarities between two works will be sufficiently pervasive to support both an inference of copying and a finding of improper appropriation.

Differences in copyright subject matter may require differential application of the two tests of copyright infringement, copying and improper appropriation. Because, for example, the vocabulary of rhythm, melody, and harmony available for musical composition is more limited than the vocabulary for literary or visual expression, courts will insist on stronger similarities to prove infringement in music infringement cases than they will in cases involving literary or artistic works.[15] Similar constraints apply in cases involving factual works, like directories, and functional works, like computer programs.

§9.1 Copyright

National laws differ in how they define economic rights. In some countries, copyright legislation provides detailed, media-specific definitions of the various restricted acts. Others apply broader and more abstract notions of "reproduction" and "communication to the public." In still other countries, like Italy, the copyright law recognizes that "[t]he author shall have the exclusive right to make economic use of his work in any form or manner."[16]

§9.1.1 Reproduction Right

Historically, the right to make copies of a copyrighted work is the seminal author's right, the law's response to the invention of moveable type. Although the

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13. *See, e.g.*, Sinanide v. La Maison Kosmeo, [1928] [K.B. Div.] 44 T.L.R. 371; ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998 (2d Cir. 1983).
14. *See* Skone James et al., §8-12 (13th ed. 1991); Goldstein 1996, §7.2.1.2.
15. *See* Goldstein 2005, §10.3.

    Courts regularly admit expert testimony in music infringement cases to determine whether similarities, even striking similarities, are attributable to a common musical vocabulary. *See, e.g.* Repp v. Webber, 132 F.3d 882, 889 (2d Cir. 1997).
16. Italy, Copyright Act Art. 12.

reproduction right was well embedded in the laws of all Berne signatories at the time the Berne Union was formed, it took almost a century, with the 1967 Stockholm Revision, for the right to be prescribed as a minimum Convention right. According to Professor Ricketson, the reason the original Berne text omitted a reproduction right was lack of agreement on the right's scope and content.[17] The problem, ultimately addressed in Stockholm, "was to find a formula wide enough to cover all reasonable exceptions but not so wide as to make the right illusory."[18]

Article 9(1) of the 1971 Berne Paris Text provides: "Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form."[19] According to the WIPO *Guide to the Berne Convention*, "[t]he words 'in any manner or form' are wide enough to cover all methods of reproduction: design, engraving, lithography, offset and all other printing processes, typewriting, photocopying, xerox, mechanical or magnetic recording (discs, cassettes, magnetic tape, films, microfilms, etc.), and all other processes known or yet to be discovered. It is simply a matter of fixing the work in some material form."[20] To avoid any doubt about the scope of the reproduction right, Article 9(3) adds, "[a]ny sound or visual recording shall be considered as a reproduction for the purposes of this Convention."[21]

National legislation around the world generally formulates the reproduction right in the same encompassing terms as the Berne Convention. Some countries rely on a short, sweeping phrase. The German Copyright Act, for example, defines the reproduction right as "the right to make copies of the work by whatever method and in whatever quantity."[22] Others, such as France, rely on equally broad language but add illustrative examples.[23]

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17. Ricketson 1987, 370.
18. WIPO 1978, 54.
19. Berne Convention, 1971 Paris Text Art. 9(1).
20. WIPO 1978, 54.
21. Berne Convention, 1971 Paris Text Art. 9(3). "This addition was made because of the deletion of the old paragraph (1) of Article 13, which provided, for authors of musical works, the exclusive right to authorise the recording of such works 'by instruments capable of reproducing them mechanically.' When the recording right became swept up with the right of reproduction generally and the latter found its place in Article 9, paragraph (1) of Article 13 lost its *raison d'etre*." WIPO 1978, 57.
22. Germany, Copyright Act Art. 16(1).
23. France, Intellectual Property Code Art. L. 122-3:

    Reproduction shall consist in the physical fixation of a work by any process permitting it to be communicated to the public in an indirect way.

    It may be carried out, in particular, by printing, drawing, engraving, photography, casting and all processes of the graphical and plastic arts, mechanical, cinematographic or magnetic recording.

    In the case of works of architecture, reproduction shall also consist in the repeated execution of a plan or of a standard project.

The British Act defines "copying" as "reproducing the work in any material form,"[24] as do the Australian[25] and Canadian[26] Acts. The U.S. Copyright Act grants the exclusive right to reproduce a copyrighted work in "copies or phonorecords"[27] and defines copies as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device."[28]

Contemporary technologies for the transmission of copyrighted works present a challenge to effective definition of the reproduction right: Should the right encompass the transient copies that are unavoidably made as a work courses through a digital network from vendor to ultimate user? An early proposal on the agenda that produced the WIPO Copyright Treaty would have answered the question affirmatively.[29] Ultimately, however, the Diplomatic Conference dropped the proposed provision from the treaty, evidently concluding that copyright control of transient copies would contribute little to copyright revenues but would significantly threaten fluent network operations.[30]

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24. United Kingdom, Copyright, Designs and Patents Act 1988 §17.
25. Australia, Copyright Act §21(1).
26. Canada, Copyright Act §3(1).
27. U.S. 1976 Copyright Act §106(1).
28. U.S 1976 Copyright Act §101. Section 101 defines "phonorecords" as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed and from which the sounds can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device."
29. Proposed Article 7 provided:

    > (1) The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form.
    >
    > (2) Subject to the provisions of Article 9(2) of the Berne Convention, it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law.

    Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Conference, prepared by the Chairman of the Committee of Experts on a Possible Protocol to the Berne Convention, Article 7, WIPO Document CRNR/DC/4 (Aug. 30, 1996).
30. A statement from the Diplomatic Conference sidestepped the question of ephemeral copies: "The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works

The E.C. Copyright in the Information Society Directive,[31] adopted on May 22, 2001, conforms copyright in the European Union to the norms of the WIPO Treaties. But, where the delegates in Geneva could reach no consensus on a reproduction right, the Directive brings acts of transient digital copying within the rubric of reproduction.[32] Article 2 of the Directive provides: "Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part . . . ."[33] As a counterbalance to this extensive exclusive right,[34] Article 5(1) instructs member states to exempt from the reproduction right transient copies made during network transmissions or for lawful purposes.[35]

§9.1.2 Distribution

Unlike the reproduction, translation, and adaptation rights, the right to distribute copies of literary and artistic works has historically received less than universal endorsement, and relatively few national legal systems have a comprehensive distribution right.[36] Germany is one, with its crisply stated

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in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention." Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Agreed Statements Concerning The WIPO Copyright Treaty, WIPO Document CRNR DC/96, Concerning Article 1(4) (December 23, 1996).

See generally Ysolde Gendreau, *The Reproduction Right and the Internet*, 178 R.I.D.A. 2 (1998); Thomas Vinje, *The New WIPO Copyright Treaty: A Happy Result in Geneva*, 19 E.I.P.R. 230 (1997).

31. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society, OJ L 167/10 of 22 June 2001.
32. A similar right was first recognized in the E.C. Software Directive Art. 4(1)(a). See also E.C. Database Directive Art. 5(a) and Art. 7(2)(a).
33. E.C. Copyright in the Information Society Directive Art. 2.
34. *See, e.g.*, Infopaq International A/S v. Danske Dagblades Forening, European Court of Justice, July 16, 2009, Case C-5/08 (automated data capture of 11 words taken from scanned newspaper articles deemed act of reproduction in part if extracted words express intellectual creation; transient copying exemption not deemed applicable).
35. *See* §11.3.2, below.
36. In France, the distribution right is conceptually linked to the reproduction right, which presumably includes a "right of destination," i.e., the author's right of "reserving, for a very specific purpose, reproductions of his work that have been put on the market." In fact, the right of destination appears at its present stage of development to be more a theory than a doctrine, encompassing only a limited class of cases. *See* Frank Gotzen, *The Right of Destination in Europe*, 25 Copyright 218 (1989). *See also* Thierry Desurmont, *The Author's Right to Control the Destination of Copies Reproducing His Work*, 134 R.I.D.A. 2, 64–66 (October 1987).

provision that "[t]he right of distribution is the right to offer to the public or to put into circulation the original work or copies thereof."[37] The United Kingdom is another, with its right to issue copies to the public introduced in the 1988 Copyright, Designs and Patents Act.[38] Other E.U. Member States, such as Belgium,[39] have added a distribution right in the course of implementing the 2001 E.C. Copyright in the Information Society Directive, which expressly prescribes this right.[40]

Section 106(3) of the U.S. Copyright Act grants the exclusive right to distribute "copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."[41] Although section 106(3) covers only acts of distribution that occur within the United States, section 602(a) effectively gives the distribution right an extraterritorial reach by providing that the unauthorized importation into the United States of copies or phonorecords acquired outside the United States constitutes infringement of the right. Section 602(a) encompasses both piratical and gray-market goods, and section 602(b) authorizes the U.S. Customs and Border Protection to bar the importation of piratical goods, but not of gray-market goods.

At the end of the twentieth century, the clear international trend was to include a full-fledged distribution right in domestic copyright doctrine, stimulated in no small part by the WIPO Copyright Treaty, which introduced a broad distribution right for literary and artistic works.[42] Article 6 of the Treaty provides: "Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and

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See generally Stig Strömholm, *The "Right of Putting into Circulation" in Relation to Copyright: A Study of Comparative Law*, 3 Copyright 266 (1967); Dietrich Reimer, *The Right of Distribution with Special Reference to the Hiring and Lending of Books and Records*, 9 Copyright 56 (1973).

The only reference to a distribution right in the Berne Paris Text is in Article 14(1), which assures authors of literary and artistic works the exclusive right to authorize "the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced."

37. Germany, Copyright Act Art. 17(1). *See, e.g.*, "Wall Pictures," German Federal Supreme Court, February 23, 1995, Case No. I ZR 68/93, 28 I.I.C. 282 (1997) (defendant's sale of parts of Berlin Wall on which plaintiffs had painted graffiti art constituted infringement.)
38. United Kingdom, Copyright, Designs and Patents Act 1988 §18.
39. Belgium, Copyright Act 1(1).
40. E.C. Copyright in the Information Society Directive Art. 4(1). Earlier European copyright Directives have harmonized the right of distribution only for certain categories of works (for computer programs in Art. 4(1)(c) Computer Programs Directive; for databases in Art. 5(1)(c) Database Directive; for neighbouring right holders in Art. 9 Rental Right Directive).
41. U.S. 1976 Copyright Act §106(3).
42. WIPO Copyright Treaty Art. 6(1).

copies of their works through sale or other transfer of ownership."[43] According to an Agreed Statement of the Diplomatic Conference concerning Articles 6 and 7, "the expressions 'copies' and 'original and copies,' being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects."[44]

§9.1.2.1 Exhaustion (First Sale)

The distribution right finds its principal limit in the "exhaustion" or "first sale" doctrine, which allows the resale of copies of works (or related subject matter) without authorization from the right holders once the copies have been put on the market with their consent. The doctrine creates a substantial, and vexed, issue for international copyright transactions: national law may hold that sale of copies exhausts the copyright owner's control within a country's boundaries but not outside them, with the result that copies may not be imported from abroad without the copyright owner's consent. The economic significance of such a rule lies in the practice of price discrimination—pricing copies differentially from country to country on the basis of relative demand for a work and the relative ability of local markets to pay for it. By contrast, to the extent that the distribution right is exhausted across borders, such "parallel imports" (or "gray imports") are permitted, effectively defeating price discrimination.

In Europe, the European Court of Justice, applying Article 28 (formerly 36) of the E.C. Treaty, long ago established the principle that the sale of a copy of a copyrighted work in one member state with the copyright owner's authority exhausts the copyright owner's right to control further distribution in any other member state.[45] Exhaustion on these terms ensures that the distribution right does not inhibit the free movement of goods in the Internal Market, one of the core freedoms of the European Community.[46]

The E.C. Copyright in the Information Society Directive of 2001, as well as other E.U. instruments in the field of intellectual property, have codified this court-made rule.[47] According to Article 4(2) of the Directive, the distribution

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43. WIPO Copyright Treaty Art. 6(1). *See also* WIPO Performances and Phonograms Treaty Arts. 8, 12.
44. Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Agreed Statements Concerning the WIPO Copyright Treaty, WIPO Document CRNR/DC/96 Concerning Articles 6 and 7 (December 20, 1996).
45. *See, e.g.*, Deutsche Grammophon v. Metro, Case 78/70 [1971] ECR 487. *See generally* Moritz Röttinger, *The Exhaustion of Copyright*, 157 R.I.D.A. 50 (1993).
46. E.C. Treaty Art. 28 (formerly Art. 30).
47. E.C. Information Society Directive, Art. 4(2). *See* E.C. Rental Right Directive, Art. 9(2); E.C. Software Directive, Art. 4(2); E.C. Database Directive, Arts. 5(c) and 7(2)(b)(2). Bechtold, *in* Dreier & Hugenholtz 2006, *Information Society Directive*, Art. 4, note 3.

right is exhausted if the "first sale or other transfer of ownership in the Community" is made by the right holder or with its consent. Right holders may not limit consent to distribution in specific member states, since this would amount to an unlawful partitioning of markets inside the Community, in violation of Article 28 of the E.C. Treaty.[48] Further, exhaustion will occur only if the transfer of ownership is made "in the Community" (i.e., in one of the member states) and not in a non-European country. The Directive thus rejects the principle of international exhaustion.[49] The Directive does not apply the principle of exhaustion to the rights of communication and making available to the public. According to recital 29, in these cases the "question of exhaustion does not arise."

The first sale doctrine in the United States carves out a major exception to the distribution right by providing that "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."[50] By centering its exemption on the "owner" of a copy or phonorecord, the provision may make it appear that the copyright owner could restrict transfers by borrowers and licensees to whom the owner of the copy or phonorecord had transferred possession but not title. Nonetheless, the provision's clear intent was to adopt the longstanding principle that a copyright owner exhausts its rights to distribute copies or phonorecords of its work upon the sale of each copy or phonorecord so that, once the copyright owner parts with ownership, everyone in the succeeding chain of title—owners and nonowners alike—will enjoy the privilege.

Section 602(a) of the U.S. Copyright Act makes the unauthorized importation into the United States of copies or phonorecords acquired outside the United States an infringement of the exclusive distribution right. Courts have generally held that section 109(a)'s first sale defense is not available to importers who acquired ownership of gray-market copies or phonorecords lawfully made abroad.[51] Courts have also held that the first sale defense is not available to a seller who acquired ownership in the United States of copies or phonorecords that, though lawfully made abroad, were unlawfully imported;[52] the defense will apply "to copies made abroad only if the copies have been sold in

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48. *See, e.g.*, Musik-Vertrieb Membran GmbH et al. v. GEMA, ECJ, January 20, 1981, joined cases 55 and 57/80, ECR [1981] 147.
49. *See* E.C. Information Society Directive, Recital 28; Laserdisken ApS v. Kulturministeriet, European Court of Justice, September 12, 2006, Case 479/04, 38 I.I.C. 844 (2007).
50. U.S. 1976 Copyright Act §109(a).
51. *See, e.g.*, Parfums Givenchy, Inc. v. Drug Emporium, Inc., 38 F.3d 477 (9th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995).
52. Columbia Broadcasting System, Inc. v. Scorpio Music Distributors, Inc., 569 F.Supp. 47, (E.D. Pa. 1983), *aff'd*, *without op.* 738 F.2d 424 (3d Cir. 1984).

the United States by the copyright owner or with its authority."[53] In *Quality King Distributors, Inc. v. L'Anza Research International, Inc.*[54] the U.S. Supreme Court addressed a third situation: where copyrighted goods, lawfully made in the United States, are shipped abroad for resale and subsequently reintroduced into the United States by the foreign purchaser. The Court ruled that in these circumstances the first sale defense applied.

The deliberations leading to the TRIPs Agreement failed to resolve the much-contested question whether the effects of exhaustion should be only domestic or international as well. Thus, TRIPs Article 6 provides that, subject to the Agreement's national treatment and most-favored-nation provisions, "nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights." Similarly, the Diplomatic Conference on the WIPO Copyright Treaty failed to agree on a rule for exhaustion, and the Treaty prescribes no rules on the nature of the acts that will exhaust the distribution right. Nor does the Treaty prescribe whether exhaustion will have only domestic effect (in which case a copy's lawful first sale would free it for resale only in the country in which the first sale occurred), or a broader international effect (in which case the first lawful sale of a copy would free the copy for unrestricted resale in any member state). Instead Article 6(2) of the treaty provides, "[n]othing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author."[55]

Legislation in many countries has carved out exceptions to the exhaustion and first sale doctrines giving copyright owners continued control over the rental of specified classes of copies and phonorecords even after their first sale. Other exceptions exist regarding acts of public lending by libraries and acts of public resale of works of visual art.[56]

9.1.2.2 Rental Rights

Advances in the reproduction technologies that enable cheap copies of motion pictures, phonograms, and computer software, and the difficulty of enforcing the reproduction right against these unauthorized private copies, have increased pressure from copyright owners for enactment of rental rights. In the case of some copyrighted works, such as computer software, for which an overnight rental of one copy can result in several unauthorized copies,

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53. Denbicare U.S.A. Inc. v. Toys "R" Us, Inc., 84 F.3d 1143, 1150 (9th Cir.), *cert. denied*, 519 U.S. 873 (1996).
54. 523 U.S. 135 (1998).
55. WIPO Copyright Treaty Art. 6(2).
56. *See* §9.1.2.4, below.

copyright owners will typically use the rental right to entirely bar rental of copies. In other situations, such as films released on video, copyright owners will treat the rental right as a potential source of revenues, affirmatively exploiting the rental market as an outlet to consumers who, not disposed to purchase a copy, would be willing to pay a smaller sum to use the work for a limited time.

Article 7(1) of the WIPO Copyright Treaty gives an "exclusive right of authorizing commercial rental to the public of the originals or copies of their works" to "[a]uthors of (i) computer programs; (ii) cinematographic works; and (iii) works embodied in phonograms, as determined in the national law of Contracting Parties."[57] This provision parallels Article 11 of the TRIPs Agreement, which requires member states to give authors of computer programs and cinematographic works "the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works."[58] The WIPO Copyright Treaty and TRIPs diverge in their treatment of rental rights in phonograms. Where the Copyright Treaty gives the right to nationally defined authors of "works" embodied in phonograms, TRIPs Article 14(4) refers instead to "producers of phonograms and any other right holders in phonograms as determined in domestic law."[59]

The WIPO Copyright Treaty carves out specially tailored exceptions from its rental right. In the case of computer programs, the rental right need not apply "where the program itself is not the essential object of the rental";[60] for example, this provision will exclude the rental of automobiles, which today commonly embody dozens of digitally programmed chips to control vital functions. A second exception, aimed directly at use of the rental right to stifle illicit copying, entitles member countries to withhold rental rights from cinematographic works "unless such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction."[61] Finally, Article 7(3) creates a safe harbor for preexisting national provisions on record rental: "Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of authors for the rental of copies of their works embodied in phonograms may maintain that system provided that the commercial rental of works embodied in phonograms is not giving rise to the material impairment of the exclusive right of reproduction of authors."[62]

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57. WIPO Copyright Treaty Art. 7(1).
58. TRIPs Agreement Art. 11.
59. TRIPs Agreement, Art. 14(4).
60. WIPO Copyright Treaty Art. 7(2)(i). *See also* TRIPs Agreement, Art. 11.
61. WIPO Copyright Treaty Art. 7(2)(ii). *See also* TRIPs Agreement Art. 11.
62. WIPO Copyright Treaty Art. 7(3).

In Europe, the rental right mandated by the E.C. Rental Right Directive,[63] first adopted in 1992, attaches to all forms of literary and artistic works other than buildings and works of applied art.[64] The Directive defines "rental" to mean "making available for use, for a limited period of time and for direct or indirect economic or commercial advantage"[65] and assigns the exclusive right to authorize or prohibit rental to "(a) the author in respect of the original and copies of his work; (b) the performer in respect of fixations of his performance; (c) the phonogram producer in respect of his phonograms: (d) the producer of the first fixation of a film in respect of the original and copies of his film."[66] A year earlier, the E.C. Software Directive extended an exclusive rental right to computer programs.[67]

In the case of commercial rental of phonograms and films, Article 5 of the Rental Right Directive grants a nonassignable and nonwaivable remuneration right to which authors and performers remain entitled even after they transfer their rental rights to a producer. This unique provision seeks to ensure that authors and performers will benefit from their rental rights, taking into account their generally weak bargaining position in relation to producers.[68] In practice, the administration of the remuneration right is entrusted to collecting societies.[69]

The U.S. Copyright Act effectively grants phonorecord[70] and computer program[71] rental rights as exceptions from its first sale doctrine. To come within the phonorecord rental prohibition, the disposition by the phonorecord owner must be without the authority of the owners of copyright in the sound recording and in any musical works embodied in the phonorecord; it must be "for the purposes of direct or indirect commercial advantage"; and it must be "by rental, lease, or lending, or by any other act or practice in the

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63. Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 ("Rental Right Directive"), OJ L 376/28, Dec. 27, 2006.
See generally Paul Edward Geller, *The Proposed EC Rental Right: Avoiding some Berne Incompatibilities*, 14 E.I.P.R. 4 (1992).
64. E.C. Rental Right Directive Art. 3(2). Article 4 provides that the Directive "shall be without prejudice" to the rental provision of the E.C. Software Directive, Art. 4(c).
65. E.C. Rental Right Directive Art. 2(1)(a). Article 1(2) of the Directive provides: "The rights referred to in paragraph 1 shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works and other subject matter as set out in Article 3(1)."
66. E.C. Rental Right Directive Art. 3(1). On the rental rights of performers and phonogram producers, *see* §9.2, below. On the E.C. Rental Right Directive generally, see Jörg Reinbothe & Silke von Lewinski, The E.C. Directive on Rental and Lending Rights and on Piracy (1993).
67. E.C. Software Directive Art. 4(1)(c).
68. E.C. Rental Right Directive Art. 5.
69. *See* E.C. Rental Right Directive Art. 5(3).
70. U.S. 1976 Copyright Act §109(b)(1)(A).
71. U.S. 1976 Copyright Act §109(b)(1)(A).

nature of rental, lease, or lending."[72] Because the phonorecord rental provision covers only phonorecords, not copies, it does not encompass the music or other sounds accompanying a motion picture or other audiovisual work.

The U.S. Act's bar on rental of copies of computer programs for purposes of direct or indirect commercial advantage contains three exceptions. First, the bar does not apply to "a computer program which is embodied in a machine or product and which cannot be copied during the ordinary operation or use of the machine or product."[73] Second, the prohibition against unauthorized rentals does not apply to "a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes."[74] Third, the Act exempts "the lending of a computer program for nonprofit purposes by a nonprofit library," so long as "each copy of a computer program which is lent by such library has affixed to the packaging containing the program a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation."[75] The provision also excuses transfers by and within nonprofit educational institutions.

§9.1.2.3 Public Lending Right

Historically, once a publisher sells a book to a library, the first sale or exhaustion doctrine liberates the copy from further copyright control. Even though the repeated borrowing of the book from the library will almost certainly erode the publisher's revenues and the author's royalties from sales to the public, neither publisher nor author will, as a rule, be entitled to compensation for these noncommercial lending transactions. However, the Member States of the European Union,[76] following the E.C. Rental Right Directive, as well as a number of other countries, have adopted a form of public lending right aimed at giving authors, and in some cases publishers, a right of remuneration for library borrowings even though no money changes hands at the library counter. Two philosophies variously animate the public lending right—a natural rights rationale tied to the standard premises of author's right doctrine, and a social welfare rationale that "society should support writers because writing is a culturally beneficial activity."[77]

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72. U.S. 1976 Copyright Act §109(b)(1)(A).
73. U.S. 1976 Copyright Act §109(b)(1)(B)(i).
74. U.S. 1976 Copyright Act §109(b)(1)(B)(ii).
75. U.S. 1976 Copyright Act §109(b)(2)(A).
76. E.C. Rental Right Directive Art. 6.
77. Jennifer M. Schneck, *Closing the Book on the Public Lending Right*, 63 N.Y.U. L. Rev. 878, 886 (1988).

    See generally Silke von Lewinski, *Public Lending Right: General and Comparative Survey of the Existing Systems in Law and Practice*, 154 R.I.D.A. 3 (1992); Public Lending Right

The United Kingdom first implemented a public lending right in 1982.[78] The right, given to writers, illustrators, translators, and editors, is freely alienable and covers the lending of books by general public libraries. The funds distributed under the right come from the government and are distributed, employing sampling procedures, in proportion to the number of times a particular book is borrowed. Although the term of the right is the term of copyright, the system is not part of the copyright law and resides instead in its own statute. As a consequence, the United Kingdom evidently views the right as unencumbered by the national treatment obligations of the Berne and Universal Copyright Conventions and, although British libraries doubtless lend a great many volumes published in other countries, the rules of the system restrict compensation to U.K. subjects and European Union nationals meeting specified requirements.[79] Australia, which first adopted a system of remuneration for public lending even earlier, in 1974,[80] gave the system statutory force with the Public Lending Right Act of 1985.[81] Just as the Australian public lending system provides for payments only to Australian nationals, the system in Canada provides for payments only to Canadians.[82]

Unlike British, Australian, and Canadian practice, most Member States of the European Union, like Germany,[83] France,[84] and the Netherlands,[85] treat the public lending right as an author's right.[86] As a consequence, public lending right funds are, under the national treatment principle, presumably

(H. Cohen Jehoram ed.,1983); Perry Morrison & Dennis Hyatt, eds., *Public Lending Right*, 29 Library Trends 565 (1981).

78. United Kingdom, Public Lending Right Scheme 1982.

    On the British system, see, John Sumsion, Setting Up Public Lending Right: A Report to the Advisory Committee (1984); Brigid Brophy, A Guide to Public Lending Right (1983); Jonathan Griffiths, *Copyright and Public Lending in the United Kingdom*, 9 E.I.P.R. 499 (1997).

79. United Kingdom, Public Lending Right Scheme 1982 § 5.

80. Peter Banki, *Public Lending Right in Australia and New Zealand*, *in* Public Lending Right: Reports of An ALAI Symposium and Additional Materials 111 (Herman Cohen Jehoram ed., 1983); Gerald Dworkin, *Public Lending Right—The UK Experience*, 13 Colum.-VLA J.L. & Arts 49, 50 (1988–1989).

81. Australia, Public Lending Right Act 1985.

82. In Australia, non-citizens who ordinarily reside in Australia are also eligible. Australia, Public Lending Right Act 1985, §§2A, 3(2), 5. In Canada, permanent residents are also eligible for public lending right payments, PLR Program Eligibility Criteria, Public Lending Right Commission.

83. Germany, Copyright Act Art. 27(2).

84. France, Intellectual Property Code Art L 133-1 to 133-4.

85. Netherlands, Copyright Act Art. 15 (c).

86. *See* European Commission, Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the public lending right in the European Union, Brussels, September 12, 2002, COM(2002) 502 final.

allocated not only to the country's own nationals but to all individuals whose works qualify under the country's international copyright relations.

The E.C. Rental Right Directive requires all member states to provide for a public lending right,[87] which, like the rental right, will not be exhausted by any form of distribution, including sale. The Directive characterizes the public lending right as an exclusive right but permits member states to elect to treat it as a right to remuneration; the Directive also leaves it to member states to treat the lending right as an author's right or not. Further, "Member States shall be free to determine [the remuneration for public lending] taking account of their cultural promotion objectives."[88] In practice, and to the chagrin of right holders and the European Commission, many member states apply far-reaching exceptions to the public lending right. Some countries have exempted practically all institutions engaged in public lending, with the consequence that no remuneration at all is actually being paid to right holders.[89]

§9.1.2.4 *Droit de Suite* (Resale Royalty Right)

The 1948 Brussels Text introduced into the Berne Convention the concept of *droit de suite,* an economic right entitling visual artists to share in the

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87. E.C. Rental Right Directive, Art 1(1) provides: "In accordance with the provisions of this Chapter, Member States shall provide, subject to Article 6, a right to authorize or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 3(1)." Art. 2(1)(b) provides that for the purposes of the Directive "'lending' means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public."

    Under Article 3(1) of the Directive "[t]he exclusive right to authorize or prohibit rental and lending shall belong to the following: (a) the author in respect of the original and copies of his work; (b) the performer in respect of fixations of his performance; (c) the phonogram producer in respect of his phonograms; (d) the producer of the first fixation of a film in respect of the original and copies of his film." Article 2(1)(c) states that, for the purposes of the Directive, "'film' means a cinematographic or audiovisual work or moving images, whether or not accompanied by sound."

88. E.C. Rental Right Directive Art. 6(1).

    Article 6(2) of the Directive provides, "Where Member States do not apply the exclusive lending right provided for in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration," and Article 6(3) provides, "Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2."

89. *See* Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Public Lending Right in the European Union, COM (2002) 502 final. The report has led to a number of infraction procedures against member states. *See, e.g.*, Commission v. Portugal, European Court of Justice, July 6, 2006, Case C-53/05 (holding that, by exempting all categories of public lending establishments from the obligation to pay remuneration to authors for public lending, Portugal failed to satisfy its obligations under the Directive).

proceeds each time their works are resold.[90] Article 14*ter*(1) of the Paris Text provides: "The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work."[91] Although the language is categorical, Article 14*ter*(2) subjects the right to a condition of material reciprocity.[92] Consequently, the right is an exception to Berne's general principle of national treatment and "is optional in the sense that Union countries are free to decide whether or not to introduce it and it can only be claimed if, and to the extent that, it forms part of the law where it is claimed."[93]

Many countries have enacted some form of *droit de suite*.[94] The resale right has a double premise. One is that works of fine art, whose value typically lies in an original or in a limited edition, are underrewarded by copyright and author's right whose economics are driven by the prospect of mass distribution.[95] The other is that artists who sell their works at starvation prices should be allowed to share in the work's increased value on resale. As Professor David Vaver has observed, "In truth, the *droit de suite* is exceptional in a scheme either of copyright or author's right: it does not relate to the use of the work, but rather to the obtaining of a share of the profits on resale. Nor is it a right to exclude or to receive compensation on use."[96]

France, the birthplace of *droit de suite*, grants "[a]uthors of graphic and three-dimensional works" an inalienable right to share in the sales price of

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90. WIPO 1978, 90.
91. Berne Convention, 1971 Paris Text Art. 14*ter*(1).
92. Article 14*ter*(3) provides: "The procedure for collection and the amounts shall be matters for determination by national legislation."
93. WIPO 1978, 91.
    See "Les Parallèles," German Federal Court of Justice, June 23, 1978, (Case No. I ZR 112/77) 10 I.I.C. 769 (1979) (holding that when Berne country of origin provides *droit de suite*, the Convention requires national treatment under protecting country's *droit de suite* even though terms of protection in country of origin differ substantially.)
94. *See generally* Report of the Register of Copyrights, Droit de Suite: The Artist's Resale Royalty (1992); Liliane de Pierredon-Fawcett, The Droit de Suite in Literary and Artistic Property: A Comparative Law Study (1991); Katzenberger, *The "Droit de Suite" in Copyright Law,* 4 I.I.C. 361, 378–379*;* Wilhelm Nordemann*, The "Droit de Suite" in Article 14ter of the Berne Convention and in the Copyright Law of the Federal Republic of Germany*, 12 Copyright 337, 340 (1977).
95. *See* E.C. Resale Right Directive Recital 3: "The resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works."
96. Vaver 1986, 719.

their works, whether sold at public auction or through private dealers.[97] Under the Intellectual Property Code, the artist's share on resale is 3 percent of the sale proceeds above a prescribed level, even if the work has fallen rather than risen in value. The right lasts for the statutory term of copyright and is descendible. Two collecting societies, the Société de la Propriété Artistique et des Dessins et Modeles (SPADEM) and the Association pour la Diffusion des Arts Graphiques et Plastiques (ADAGP), control collection of most proceeds under the *droit de suite*.[98]

The *droit de suite* was harmonized in the European Union in 2001, after staunch opposition from member states, such as the United Kingdom and the Netherlands, that had not provided for a resale right prior to the Directive. (These countries evidently feared that such a right would injure national art markets.) The Directive characterizes the resale right as an inalienable and nonwaivable right to remuneration, which is due for every second and subsequent sale of an "original work of art," defined as "works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art."[99] Remuneration is to be paid for all acts of resale involving as sellers, buyers, or intermediaries, art market professionals, such as salesrooms, art galleries, and, in general, any dealers in works of art.[100] The resale right does not apply to private sales.

The Directive treats the resale right as "an integral part of copyright" and "an essential prerogative for authors,"[101] leaving no doubt that it applies only to copyrighted works and that its operation is controlled by the Berne Convention's special rule of reciprocity (Article 14*ter*).

The fact that the terms of compensation under *droit de suite* differ from country to country and that many countries have no resale royalty system at all, creates an incentive for sellers to conduct their activities through art galleries and auction houses in countries where resale royalties are low or nonexistent. In an interesting 1994 decision,[102] the German Federal Supreme Court ruled that, for the German Copyright Act's *droit de suite* provision to apply, the resale in issue must have a sufficient connection to German territory, and that the auction in England of three works by Joseph Beuys lacked the necessary connection even though both the artist and the seller were

97. France, Intellectual Property Code Art. L. 122-8. *See generally* Report of the Register of Copyrights, Droit de Suite: The Artist's Resale Royalty, 22–24 (1992).
98. *See* Report of the Register of Copyrights, Droit de Suite: The Artist's Resale Royalty, 24–25 (1992).
99. E.C. Resale Right Directive Art. 2(1).
100. E.C. Resale Right Directive Art. 1(2).
101. E.C. Resale Right Directive Recital 4.
102. *Folgerecht bei Auslandsbezug* ("Droit de suite with Respect to Sales Abroad"), German Federal Supreme Court, June 16, 1994, Case No. I ZR 24/92, 26 I.I.C. 573 (1995).

German citizens, the auction contract was negotiated in Germany, and the works were delivered in Germany to the auction house's subsidiary there. Relying on general principles of territoriality in copyright infringement cases,[103] the court observed that "[t]he requirement deriving from the territoriality principle that for German law to apply to acts of exploitation there must be a connection to Germany also applies to resales. That the latter is treated in the same way is supported by the legal nature of *droit de suite* deriving from the act of resale."

§9.1.3 Translation and Adaptation

The variety of national languages among the original members of the Berne Union, and the fact that each language represented a distinct market for a work's exploitation, probably explains why the translation right was the first right to be expressly included as a minimum Berne requirement.[104] Article 8's broad formulation, ensuring authors the right "of making and of authorizing the translation of their works,"[105] may encompass not only translations from one written or spoken language to another, but also translations from one computer language to another.

Article 12 of the Berne Convention, Paris Text, provides as a minimum that authors of literary or artistic works "shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works,"[106] and Article 14(1) adds the exclusive right of authorizing "the cinematographic adaptation and reproduction of these works."[107] "Adaptation" in Article 12 probably means the recasting of a work from one format into another, as from a short story into a dramatic play or from a cartoon series into a musical comedy, while "arrangement" probably means modification within the same format, such as an orchestral arrangement of a popular song.[108] Together with the catch-all "other alterations," these terms are doubtless sufficiently wide to encompass the cinematographic adaptation covered by Article 14(1).

The E.C. Software Directive includes a right against the "translation" as well as "adaptation, arrangement and any other alteration" of a computer program.[109] However, no general harmonization of a translation or adaptation right with regard to other categories of works has since occurred, not

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103. *See* §4.1.2, above.
104. According to Professor Ricketson, this right "was probably the most important factor which drew states into international copyright agreements in the late nineteenth century." Ricketson 1987, 384.
105. Berne Convention, 1971 Paris Text Art. 8.
106. Berne Convention, 1971 Paris Text Art. 12.
107. Berne Convention, 1971 Paris Text Art. 14(1)(i).
108. *See* Ricketson 1987, 398–399 .
109. E.C. Software Directive, Art. 4(1)(b). *See also* Canada, Copyright Act §30.6(a).

even in the context of the "horizontal" E.C. Copyright in the Information Society Directive.

Some countries, such as France and the Netherlands, treat the adaptation right as an aspect of the reproduction right,[110] while others, such as Japan[111] and the United Kingdom,[112] treat adaptation as a discrete economic right. The U.S. Copyright Act grants a copyright owner the exclusive right "to prepare derivative works based upon the copyrighted work."[113] The Act defines "derivative work" expansively, as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."[114]

In civil law courts, the question whether a second work is an infringing adaptation of the first work will largely turn on whether, and to what extent, creative elements from the first work have been appropriated into the second. If the "distance" between first and second work is great enough, no adaptation will be found.[115] American courts have been notably expansive in their extension of the derivative right, holding that derivative rights encompass the deletion of parts of a copyrighted news program in the course of its broadcast, and even the publication of a manual containing the answers to physics problems in plaintiff's copyrighted textbook.[116]

The economic right of adaptation will sometimes overlap the moral right of integrity, which similarly empowers authors to control changes in their work.[117] The overlap can be consequential, particularly in cases where gaps exist in a country's formulation of moral right. In one case, for example, an American court ruled that defendant's production of books it had assembled by cutting up, rearranging, and rebinding original articles clipped from copies of plaintiff's magazine infringed plaintiff's adaptation right.[118] In an even more extended decision, a court ruled that defendant infringed plaintiffs' copyright when it removed reproductions of artwork from books it had purchased and mounted the reproductions on ceramic tiles for retail sale. "By borrowing and mounting the preexisting, copyrighted individual art images

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110. France, Intellectual Property Code Arts. L. 122-1, 122-4; Netherlands, Copyright Act Art. 13.
111. Japan, Copyright Act Art. 27.
112. United Kingdom, Copyright, Designs and Patents Act 1988 §16(1)(e).
113. U.S. 1976 Copyright Act §106(2).
114. U.S. 1976 Copyright Act §101.
115. *See, e.g.*, Germany, Copyright Act Art. 24; Germany, "Lara's Daughter," Federal Supreme Court, April 29, 1999, Case No. I ZR 65/96, 31 I.I.C. 711 (2000) (unauthorized sequel to *Dr. Zhivago* deemed unauthorized adaptation for lack of sufficient "inner distance").
116. *See generally* Goldstein 2005, §7.3.
117. On the right of integrity, *see* §10.2, below.
118. National Geographic Soc'y v. Classified Geographic, Inc., 27 F. Supp. 655 (D.Mass. 1939).

without the consent of the copyright proprietors . . . appellant has prepared a derivative work and infringed the subject copyrights."[119]

An English case, *Holland v. Vivian Van Damm Productions, Ltd.*,[120] holding that defendant's ballet, *The Nightingale and the Rose*, infringed the copyright in Oscar Wilde's popular short story of the same title, illustrates the extent to which the adaptation right can do double service as a right against distortion of a traditional literary work. Wilde's story was only 13 pages long, the tale was simple, many of its elements were old, and the ballet departed from it in many respects—hardly enough in the usual case to support a claim of copyright infringement. Yet, "having regard to the difference of medium," the court concluded that "the ballet does substantially reproduce the tale so far as it reproduces the combination or series of dramatic events in the tale."[121] As a matter of strict copyright principle, *Van Damm* could well have been decided against the copyright owner, for the expressions in the two works probably diverged too substantially to support a finding of infringement. Presumably the motive behind the result was the court's solicitude not for copyright principle, but for Wilde's reputational interests. Disregarding the significant structural and substantive dissimilarities between the two works, the court focused instead on the defendant's admission in its advertising that the ballet was "based on," "adapted from," and "inspired by" the Wilde story, and on the fact that the ballet's producer admitted that "the name of Oscar Wilde was a valuable advertising feature." Had defendant used neither Wilde's name nor the title of the story, with the implicit suggestion of Wilde's approval, it is certainly plausible that the case would have been decided differently.[122]

§9.1.4 Communication to the Public

Some national legislation comprehensively defines the right to exploit copyrighted works through intangible means as a general right to communicate a work publicly,[123] while other legislation employs specific terms, such as

119. Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1343 (9th Cir. 1988), *cert. denied*, 489 U.S. 101 8 (1989). *But see* Lee v. A.R.T. Co., 125 F.3d 580 (7th Cir. 1997).

120. [Ch. 1936] *in* E.J. McGillivray, Copyright Cases 1936–45, 69 (1949).

121. [Ch. 1936] *in* E.J. McGillivray, Copyright Cases 1936–45 69, 76 (1949).

122. *See also* Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1343 (9th Cir. 1988). *See generally* Paul Goldstein, *Adaptation Rights and Moral Rights in the United Kingdom, the United States and the Federal Republic of Germany*, 14 I.I.C. 43 (1983).

123. *See, e.g.*, Germany, Copyright Act Art. 15(2); France, Intellectual Property Code Art. L. 122-2.

rights of public performance, recitation, and broadcasting.[124] The Universal Copyright Convention inclines toward the first approach in prescribing the exclusive right to authorize "public performance and broadcasting,"[125] while the Berne Convention tends toward the second approach in itemizing discrete rights to perform,[126] recite,[127] and broadcast.[128] The U.S. Copyright Act takes an intermediate approach, assimilating broadcasts and recitation to its public performance right[129] but prescribing a discrete public display right.[130] The right to communicate a work to the public, introduced by the WIPO Copyright Treaty, both overlaps Berne's guarantees and extends their reach.[131] Neither the Berne Convention nor the U.C.C. requires a discrete display right (or exhibition right) for works of visual art, and only a few countries give this right to visual artists.[132]

One requirement underpins all formulations of the right to exploit works through intangible means: the exploitation must be public. Although variations in the term appear from country to country, most appear to exclude from the definition of "public" those uses that take place within the confines of a circle of family and friends.[133] Emerging communication technologies that enable individuals to receive performances of works on demand in the privacy of their homes have raised new and difficult questions about the meaning of "public" in this context. If it is a public performance, or a communication to the public, to broadcast a musical composition to thousands of home radios, is it also a public performance or communication when an online music store streams musical works, one at a time, on individual demand, to millions of consumers, each using his own playback device? The right of communication to the public introduced by Article 8 of the WIPO Copyright Treaty and implemented in national laws as well as incorporated in the E.C. Copyright in the Information Society Directive of

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124. *See, e.g.*, Canada, Copyright Act §3(1); Japan, Copyright Act Arts. 22–26; United Kingdom, Copyright, Designs and Patents Act 1988 §16.
125. Universal Copyright Convention, 1971 Paris Text Art. IV*bis*(1).
126. Berne Convention, 1971 Paris Text Art. 11. *See* §9.1.4.1, below.
127. Berne Convention, 1971 Paris Text Art. 11*ter*. *See* §9.1.4.1, below.
128. Berne Convention, 1971 Paris Text Art. 11*bis*. *See* §9.1.4.3, below.
129. U.S. 1976 Copyright Act §106(4).
130. U.S. 1976 Copyright Act §106(5).
131. WIPO Copyright Treaty Art. 8. *See* §9.1.4.5, below.
132. One exception is Germany, Copyright Act Arts. 18, 19. *See generally* Cristina Vincent Lòpez, *New Aspects of the Exhibition Right: Comparative Analysis*, 179 R.I.D.A. 78 (1999); Ricketson 1987, 453–455.
133. *See, e.g.*, France, Intellectual Property Code Art. L. 122-5; Germany, Copyright Act, Art. 15(3); U.S. 1976 Copyright Act §101 (definition of "publicly").

2001,[134] has brought such "making available online" of works within copyright control.[135]

An extensive case law has developed around the question of what is "public" for purposes of the rights of communication, performance, recitation, broadcast, and display. Although this body of doctrine is indecisive at its edges, the biases of one copyright tradition or another do not explain the doctrinal variations. Rather, the definition of "public" tends to shrink or expand depending on the nature of the right at issue. For example, while the performance right generally contemplates reception outside a narrowly circumscribed circle of family and friends,[136] broadcasting rights sometimes require larger audiences to become operational. Thus, the European Court of Justice has opined that broadcasting by satellite requires "an indeterminate number of potential television viewers" for the exclusive right to become effective.[137]

Although the U.S. Copyright Act does not define the pivotal term "public," it does provide that to perform or display a work "publicly" means, in part, "to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[138] Under this definition, a place is "open to the public" if members of the public are free to enter without restrictions, other than restrictions such as an admission fee, that are imposed on the public at large. Performances in semipublic places, such as clubs, lodges, factories, summer camps, and schools, with more personalized conditions on entry, may also constitute public performances. One decision in the United States[139] held that it infringed the public performance right for individuals to play videocassettes in private booths they had rented from the owner of a videocassette rental store, while another[140] held that, since a hotel room is a private rather than a public place, it did not constitute public performance for a hotel to rent videodiscs to guests for performance on consoles in their rooms.

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134. E.C. Copyright in the Information Society Directive Art. 3.
135. *See* §9.1.4.5, below.
136. *See, e.g.*, France, Intellectual Property Code Art. L. 122-5; Germany, Copyright Act, Art. 15(3); U.S. 1976 Copyright Act §101 (definition of "publicly").
137. Lagardère Active Broadcast v. Société pour la Perception de la rémunération équitable (SPRE) and Others, ECJ July 14, 2005, case C-192/04 (no communication to the public of encrypted satellite if means of decoding are made availble only to professionals, not the general public). *See also* BUMA and STEMRA v. Chellomedia Programming, Supreme Court of the Netherlands (Hoge Raad), June 19, 2009, 34 AMI 12 (2010).
138. U.S. 1976 Copyright Act §101.
139. Columbia Pictures Industries, Inc. v. Aveco, Inc., 800 F.2d 59 (3rd Cir. 1986).
140. Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., 866 F.2d 278 (9th Cir. 1989).

By contrast, a U.S. court held that a system operator that, without authority, transmitted motion pictures to guests in hotel rooms as and when requested by them, infringed the performance right because individuals watching a motion picture in their rooms are, in their relationship to the operator, members of the public.[141] Similarly, the European Court of Justice has interpreted the right of communication harmonized in the E.C. Copyright in the Information Society Directive to encompass transmission of films over hotel networks. According to the Court, "[T]he private nature of hotel rooms does not preclude the communication of a work by means of television sets from constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29."[142]

§9.1.4.1 Public Performance and Recitation

Article 11(1) of the 1971 Berne Paris Text ensures authors of "dramatic, dramatico-musical and musical works" the exclusive right to authorize "(i) the public performance of their works, including such public performance by any means or process;" and "(ii) any communication to the public of the performance of their works."[143] Article 11(2) adds that authors of dramatic or dramatico-musical works "shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof."[144]

As a rule, performing a work means to represent it by sight or sound, or both. The representation may be by live actors or singers, and by any means or process. The second part of the right, covering a communication of the performance to the public, encompasses any technology by which a performance can be transmitted other than broadcasting. Wired transmission is one example.[145]

Berne's prescription in Article 14(1)(ii) of minimum performance rights for use in cinematographic works encompasses all forms of literary and artistic works, not just dramatico-musical and dramatic musical works, and the Treaty guarantees authors the exclusive right to authorize the "public performance and communication to the public by wire" of their works as adapted or reproduced in a cinematographic production.[146] Article 14*bis*(1) adds that "[t]he owner of copyright in a cinematographic work shall enjoy the same

141. On Command Video Corp. v. Columbia Pictures Industries, 777 F.Supp. 787, 790 (N.D. Cal. 1991).
142. SGAE v. Rafael Hoteles SA, European Court of Justice, December 7, 2006, Case C-306/05.
143. Berne Convention, 1971 Paris Text Art. 11(1).
144. Berne Convention, 1971 Paris Text Art. 11(2).
145. *See* WIPO 1978, 65.
146. Berne Convention, 1971 Paris Text Art. 14(1)(ii).

rights as the author of an original work," including among others, the rights of public performance and communication described in Article 14.[147]

Together with the rights of adaptation and translation, the right of public performance is one of the few economic rights that remain unharmonized in the European Union. (The right of communication to the public prescribed by the E.C. Information Society Directive concerns acts of communication "by wire or wireless means" and therefore does not apply to on-site performances.)[148] Article 15(2) of the German Copyright Act encompasses several categories of conduct within the broad right of communication to the public in nonmaterial form: the right of recitation, performance, and presentation; the right of broadcasting; the right of communication by means of video or audio recordings; and the right of communication of broadcasts. In France, the overarching notion of *représentation* (literally: performance) encompasses any communication of the work to the public, "particularly public recitation, lyrical performance, dramatic performance, public presentation, public projection and transmission in a public place of a telediffused work."[149]

The U.S. Copyright Act, which gives copyright owners of all classes of works other than sound recordings and pictorial, graphic, and sculptural works the exclusive right to perform and to authorize others to perform their works publicly, categorizes the conduct encompassed under the single concept of "performance."[150] The Act defines the term "perform" in the most encompassing terms. To perform a work means "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible."[151] The legislative history of the Act suggests the definition's broad sweep: "a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a

147. Berne Convention, 1971 Paris Text Art. 14*bis*(1).

148. This is confirmed by E.C. Copyright in the Information Society Directive Recital 23: "This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates."

149. France, Intellectual Property Code Art. L 122-2 (1).

150. U.S. 1976 Copyright Act §106(4). Though excluded from the general public performance right, sound recordings have, under amendments passed in 1995, received a limited right to perform the copyrighted work publicly by means of a digital audio transmission. U.S. 1976 Copyright Act §106(6).

151. U.S. 1976 Copyright Act §101.

phonorecord embodying the performance or communicates the performance by turning on a receiving set."[152]

Some national laws assimilate the public recitation of literary works such as poems and stories into a general public performance right, while others distinguish between literary works, on the one hand, and dramatic, musical, or dramatico-musical works on the other, granting a right of recitation to one and a performance right to the other. Little consequence turns on the distinction since both approaches satisfy Article 11*ter* of the Berne Paris Text which ensures authors of literary works "the exclusive right of authorizing: (i) the public recitation of their works, including such public recitation by any means of process;" and "(ii) any communication to the public of the recitation of their works."[153] As in the case of the performance right, the Berne Paris Text adds that "[a]uthors of literary works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof."[154]

§9.1.4.2 Exhibition and Display

A discrete right to exhibit or display literary or artistic works to the public has been only partially established in national copyright legislation.[155] The German Copyright Act defines the right of exhibition as "the right to place on public view the original or copies of an unpublished work of fine art or of an unpublished photographic work."[156] An argument has been made that the legislative history behind the Law of July 3, 1985, supports the position that French copyright law effectively assimilates an exhibition right into the performance right.[157] Canada's Copyright Act expressly prescribes an exhibition right, granting an exclusive right to present an artistic work, other than a map, chart, or plan, at a public exhibition for a purpose other than sale or hire.[158] In some countries, artists may also receive compensation for exhibition of their works through non-copyright arrangements instituted by national or local governments comparable to the public lending right for authors.[159]

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152. U.S. House Report, 63.
153. Berne Convention 1971 Paris Text Art. 11*ter*(1).
154. Berne Convention, 1971 Paris Text Art. 11*ter*(2).
155. For an exhaustive analysis of the exhibition right, *see* Duchemin 1993.
156. Germany, Copyright Act Art. 18. Article 19(4) of the Act prescribes a right of presentation to make specified visual works "perceivable to the public by means of technical devices," but not including "the right to make the broadcast of such rights perceivable to the public."
157. Duchemin 1993, 44.
158. Canada, Copyright Act §3(1)(g).
159. Duchemin 1993, 48–52.

The U.S. Copyright Act grants an exclusive right to display, and to authorize others to display, publicly any "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work."[160] The Act defines the "display" of a work as meaning "to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially."[161] The display right encompasses showings both of an original work (either directly, as by exhibition in a museum, or indirectly, as by a showing on television) and of reproductions of the work, such as by summoning stored text from a database to a computer screen or by projecting individual images on a screen. The right is of limited value to fine artists, however, since the owner of a particular copy of a work, or anyone authorized by the owner, is privileged to display the copy publicly.[162]

§9.1.4.3 Broadcasting

The performance right—and, where applicable, the recitation right—historically presupposed that the audience would be at the site where the performance or recitation took place. Article 11*bis* of the Berne Paris Text deals with more distant audiences, from those reached through relatively rudimentary devices such as amplifiers and loudspeakers[163] to broadcast audiences,[164] to audiences for rebroadcasts and wire transmissions.[165] Article 11*bis*(1)(i) requires member countries to grant authors of literary and artistic works the exclusive right to authorize "the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images."[166] It is central to this right, as to the other aspects of the broadcasting right, that some form of receiver intermediate between the performer and the audience.[167] But, for conduct to fall within the right, it is necessary only that signals be emitted; "it is immaterial whether or not they

160. U.S. 1976 Copyright Act §106(5).
161. U.S. 1976 Copyright Act §101.
162. U.S. 1976 Copyright Act §109(c).
163. Berne Convention, 1971 Paris Text Art. 11*bis*(1)(iii).
164. Berne Convention, 1971 Paris Text Art. 11*bis*(1)(i).
165. Berne Convention, 1971 Paris Text Art. 11*bis*(1)(ii).
166. Berne Convention, 1971 Paris Text Art. 11*bis*(1)(i). *See generally* Robert Dittrich, *On the Interpretation of Article 11bis(1) and (2) of the Berne Convention*, 19 Copyright 294 (1982).
167. WIPO 1978, 67.

are in fact received."[168] Thus, even if no single member of the public views or hears the signal, it will nonetheless constitute a broadcast to the public.

Although legislation in most countries encompasses the full range of broadcasting activities contemplated by the Berne Paris Act, differences exist from country to country on how the rights are divided, particularly as between wireless and wired transmission. The E.C. Information Society Directive has effectively harmonized all economic rights with respect to acts of public communication "by wire and wireless means." The right of communication prescribed by Article 3 of the Directive thus encompasses not only broadcasting, but also cablecasting, cable retransmission, and webcasting.[169]

The French Intellectual Property Code makes "representation" (i.e., performance) consist of "the communication of the work to the public by any process whatsoever," including "*télédiffusion*," which it defines as "distribution by any telecommunication process of sounds, images, data and messages of any kind."[170] The Code's formulation of the term "performances" is sufficiently wide to include cablecasting and digital transmission over the Internet, so long as they are "to the public."[171] The general right of communication to the public under the German Copyright Act[172] encompasses not only recitation, performance, and presentation,[173] but also wireless or wired transmissions[174] and retransmissions.[175]

The British legislation makes it a restricted act to broadcast a work or include the work in a cable programme service in the case of a literary, dramatic, musical, or artistic work, a sound recording or film, or a broadcast or cable program.[176] The Australian Copyright Act grants an encompassing right to communicate a work to the public and defines "communicate" as "to make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter."[177] The Canadian copyright legislation similarly separates the right of communication to the public from the general performance

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168. WIPO 1978, 66. *See, e.g.*, Germany, *Felsberg Transmitter*, Federal Supreme Court, November 7, 2002, Case I ZR 175/00, 35 I.I.C. 977 (2004) (broadcast from German terrestrial broadcasting station aimed at French audiences deemed communication to the public in Germany, even if program was actually received in Germany by very small audience).
169. Recital 23.
170. France, Intellectual Property Code Art. L. 122-2.
171. *See* Thierry Desurmont, *Legal Classification of Digital Transmission*, 170 R.I.D.A. 55 (1996).
172. Germany, Copyright Act Art. 15(2).
173. Germany, Copyright Act Art. 19.
174. Germany, Copyright Act Art. 20.
175. Germany, Copyright Act Art. 22.
176. United Kingdom, Copyright, Designs and Patents Act 1988 §20. Section 7 of the Act defines "cable programme" and "cable programme service."
177. Australia, Copyright Act §10(1).

right and does so in terms that encompass broadcast, cable, and Internet transmission: "any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system."[178]

The second branch of the U.S. Copyright Act's definition of "public" performance or display encompasses the transmission or other communication of a performance or display of a work to a public place "or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."[179] The reference to members of the public "capable of receiving" the performance in "separate places" leaves no doubt that a performance made available through transmission to the public at large is "public" even though the recipients "are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission."[180]

According to the WIPO *Guide to the Berne Convention*, "a difference of opinion exists on whether transmission of a signal to a communications satellite for purposes of public distribution through an earth station constitutes broadcasting within the meaning of this Article."[181] The 1993 E.C. Satellite and Cable Directive[182] requires, in general, that member states provide "an exclusive right for the author to authorize the communication to the public by satellite of copyrighted works," subject to prescribed conditions.[183] Since the Directive's principal aim is to foster pan-European broadcasting services, it specifies that a satellite broadcast amounts to communication to the public only in the country where the uplink of the program-carrying signal occurs. Thus, the Directive departs from the so-called "Bogsch theory," named after former WIPO Director-General Dr. Arpad Bogsch, which treated a satellite broadcast as a restricted act in all countries falling within its "footprint," thus requiring licenses from all right holders in that geographical area. Under the

178. Canada, Copyright Act §2. *See* SOCAN v. Canadian Assoc. of Internet Providers, (2004) 32 C.P.R. (4th) (S.C.C.) (Among other things, the Supreme Court held that it was a telecommunication "when the music [was] transmitted from the host server to the end user." *Id*. at §42.)

179. U.S. 1976 Copyright Act §101.

180. U.S. House Report, 64–65.

181. WIPO 1978, 67.

182. Council Directive 93/83/EEC ("Satellite and Cable Directive"), September 27, 1993, OJ L 248, Art. 2.

183. E.C. Satellite and Cable Directive Art. 1(2)(b): "The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth."

Directive, a license is needed only in the country of origin of the satellite broadcast.

§9.1.4.4 Cable Retransmission

Berne Article 11*bis*(1)(ii) covers retransmission of broadcast signals and guarantees the exclusive right to authorize "any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one."[184] Communication "by wire" and "rebroadcasting" encompass cable and community antenna television systems along with other retransmission media. By lodging this right under a separate broadcast right, rather than under a generalized performance right, the Berne Convention sidesteps the historically difficult question whether cable and community antenna carriage is more closely akin to performance or to reception, while at the same time subjecting retransmission to definitive liability, subject to local conditions such as equitable remuneration on exercise of the right.[185]

Unlike the public performance right, the Berne Convention's later-added guarantees of broadcasting, retransmission, and public communication rights permit member states to qualify these exclusive rights. Article 11*bis*(2), which makes it a matter for local legislation to determine the conditions under which these rights may be exercised, also imposes three limitations on the legislative prerogative.[186] One is that the conditions shall not impair the author's "right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority," a limitation that underlies the widespread use of compulsory licenses in this field. Second, any such conditions are bounded by the territory of the country prescribing them. The third requirement, that the conditions "shall not in any circumstances be prejudicial to the moral rights of the author," is in any event presumably implied in the case of all such restrictions or authors's rights under Berne.[187]

Since the emergence of cable television as an economically significant medium, the questions whether and how it should be brought within copyright control has been complicated by concerns that transaction costs and the competing interests of program owners and broadcasters might unduly hamper cable operations. In Europe, despite the clear language of Article 11*bis*(1)(ii), it required an extensive jurisprudence to establish that cable retransmission of broadcast programs constitutes a restricted act and

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184. Berne Convention, 1971 Paris Text Art. 11*bis*(1)(ii).
185. Berne Convention, 1971 Paris Text Art. 11*bis*(2). *See* §11, below.
186. Berne Convention for the Protection of Literary and Artistic Works, 1971 Paris Text Art. 11*bis*(2).
187. *See* Ricketson 1987, 526.

therefore requires licensing, even within the "direct reception zone" of the broadcast.[188] Consequently, cable operators faced the daunting task of securing retransmission licenses from all right holders concerned before they could retransmit copyrighted programming. Although the European Commission initially favored statutory licenses as the answer to this problem,[189] the 1993 E.C. Satellite and Cable Directive ultimately settled on a mechanism of compulsory collective management of exclusive rights. Article 8 of the Directive establishes the principle that when a program is retransmitted from a member country, the receiving country shall ensure "that such retransmission takes place on the basis of individual or collective contracted agreements between copyright owners, holders of related rights and cable operators," but Article 9(1) effectively imposes collective licensing agreements on all copyright owners other than broadcasting organizations in connection with their own transmissions. Article 11 provides for mediation in cases where agreement cannot be reached on terms for cable retransmission.[190]

The Satellite and Cable Directive's ambit is limited to acts of retransmission of broadcast programs, which presupposes an initial act of broadcasting. It does not apply when program-carrying signals are introduced directly into cable networks, as increasingly occurs with digital broadband infrastructures.[191] Cable transmission of such directly introduced signals will be deemed an act of *primary* communication to the public, not subject to the Directive's rules on cable retransmission.

Section 111 of the U.S. Copyright Act deals with the retransmission of primary transmissions containing performances or displays and focuses primarily, but not exclusively, on the operations of cable television systems.[192] Section 111 establishes three categories of liability for secondary transmissions that come within its scope. First, among other uses, the Act entirely exempts secondary transmissions by common carriers, by hotels for guests,

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188. *See, e.g.*, Switzerland, SUISA v. Redifusion SA, Federal Court, January 20, 1981, 111 R.I.D.A. 196 (1982); Netherlands, Supreme Court, October 30, 1981, Case 11.739, 14 I.I.C. 431 (1983); and May 25, 1984, Case 12.281, 17 I.I.C. 137 (1986). This line of case law has been extended more recently to include cable retransmission over small-scale collective antenna systems, *see, e.g.*, France, Court of Cassation, March 1, 2005, 205 R.I.D.A. 444 (2005).
189. European Commission, *Television without Frontiers*, Green Paper, COM (84) 300 final, Brussels, June 14, 1984.
190. E.C. Satellite and Cable Directive Art. 8–11.
191. BUMA and STEMRA v. Chellomedia Programming, Supreme Court of the Netherlands June 19, 2009, 34 AMI 12 (2010) (holding that satellite transmission of encrypted signals intended for cable operators, not the general public, does not qualify as communication to the public).
192. Section 119 of the 1976 Act creates comparable rules for secondary transmissions of superstations and network stations, and section 118 grants public broadcasting entities a compulsory license to perform published nondramatic musical works in the course of a transmission made by a noncommercial educational broadcast station.

and for instructional broadcasts.[193] Second, the Act provides that, subject to prescribed conditions, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the appropriate governmental authority in the United States, Canada, or Mexico will be subject to compulsory licensing "where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission."[194] Finally, the Act subjects to full liability any secondary transmission falling outside the scope of the exemptions and compulsory license or not meeting their conditions.[195]

Article 11*bis*(1)(iii) of the Berne Convention covers the right to authorize "the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work."[196] This clause would encompass a radio playing background music in a store or a television showing a sports event in a bar.[197] In practice, like cable retransmission right, these secondary performance rights will in many countries be managed and exercised by collecting societies.[198]

§9.1.4.5 Making Available Online

Arguably, Articles 11, 11*bis*, and 11*ter* of the Berne Paris Text have provided an adequate structure for balancing author and consumer interests within the context of most twentieth-century technologies. But these provisions, and the national legislation of a great many countries, fall short of resolving the question of whether newer technologies enabling interactive, on-demand transmissions, most notably on the Internet, come within copyright control. The issue under Berne is not whether such uses constitute performance, but whether they are public. Although works offered over the Internet may be accessible to publics much larger than those reached by traditional broadcast radio and television, access to the Internet will often entail transmission of a selected work to an individual user on demand, so that it is received only by that single user, typically in the privacy of his or her home.

Article 8 of the 1996 WIPO Copyright Treaty provides that "authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means,

193. U.S. 1976 Copyright Act §111(a).
194. U.S. 1976 Copyright Act §111(c)(l).
195. U.S. 1976 Copyright Act §111(b).
196. Berne Convention, 1971 Paris Text Art. 11*bis*(1)(iii).
197. WIPO 1978, 68.
198. E.C. Satellite and Cable Directive Art. 1(2)(b). According to Recital 14 to the Directive, "such a definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting."

including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."[199] The first part of this formulation effectively restates the existing coverage of the Berne Paris Text and of most national legislation. It is the second part of the provision, called by a trio of commentators one of the treaty's "main achievements,"[200] that for many countries[201] has charted new territory by securing the right to control individualized, interactive uses of copyrighted works.

In the United States, transmission to individual members of the public is encompassed by the second branch of the definition of "publicly" perform: "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."[202] The legislative history behind the Act appears to have contemplated then-untapped storage and delivery technologies in its observation that a performance will be public when the transmission is capable of reaching different recipients at different times, as in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public.[203] Relying on this legislative history, one court held that it constituted public performance to transmit signals over a wired system that connected hotel guest rooms to a centrally located console that contained motion picture videocassettes and enabled guests to view the motion pictures when they chose.[204]

Like the WIPO Copyright Treaty, the E.C. Copyright in the Information Society Directive categorizes the right of making available to the public as a species of a more general right of communication to the public.[205] The right applies irrespective of whether and how often the work is actually accessed. Examples include offering for download or streaming a musical work from an online music store or a pay-per-view television channel and "sharing" music or video files over a peer-to-peer file-sharing network. Posting hyperlinks to

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199. WIPO Copyright Treaty Art. 8. Article 8 is, by its terms, "[w]ithout prejudice to the provision of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(i)(ii) and 14*bis*(1) of the Berne Convention."
200. Reinbothe et al. 1997, 173.
201. Prior to the WIPO Copyright Treaty several civil law countries already provided for broadly worded rights of public performance or communication to the public. *See*, *e.g.*, France, Intellectual Property Code Art. L. 122 (2); Netherlands, Copyright Act Art. 12; Spain, Copyright Act Art. 20. *See generally* P. Bernt Hugenholtz, *Adapting copyright to the information superhighway*, *in* Hugenholtz 1996, 81–102.
202. U.S. 1976 Copyright Act §101.
203. House Report No. 83, 90th Cong., 1st Sess. 29 (1967).
204. On Command Video Corp. v. Columbia Pictures Industries, 777 F.Supp. 787 (N.D. Cal. 1991).
205. E.C. Copyright in the Information Society Directive Art. 3(1).

works already available on websites, however, is not an independent act of communication.[206]

The Directive rules out exhaustion of either the right of communication to the public or the right of making available to the public.[207] Consequently, offering works online in more than one European Union country will require multiple licenses from right holders and collecting societies in these countries. Devising mechanisms to facilitate online licensing at the European level is one of the most challenging issues in European copyright law today.[208]

The right of communication to the public, including making available online, assumes an active role on the part of the "communicator," so that merely operating a telecommunications communications network does not amount to communication. At the Geneva Diplomatic Conference that produced the WIPO Treaties in 1996, the signatory countries agreed that "[i]t is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention."[209] The Agreed Statement clearly signals that an intermediary telecommunications operator, such as an Internet service provider, cannot be held liable for *direct* infringement, insofar as the "right of communication to the public" is concerned.[210] However, the Statement does not rule out liability for indirect infringement.[211]

§9.1.5 Secondary (Contributory) Liability

The law in most countries will, under prescribed conditions, impose secondary liability on those who, though not directly infringing copyright, have materially contributed to the infringement. Some countries, particularly those following the British legal tradition, base such secondary liability directly on the law of copyright; other countries rest this liability on more general principles of private (tort) law. One practical aspect of secondary liability is that, in countries whose legislation does not confer an exclusive distribution or importation right, secondary liability can bring the activities of distributors, importers, and retailers within copyright control. Similarly, if the direct infringer is outside the court's jurisdiction or is without the resources to

206. Germany, *Paperboy*, German Federal Supreme Court, July 17, 2003, Case I ZR 259/00, I.I.C. 2004, 1097; Norway, *Napster.no*, Norway, Supreme Court, January 27, 2005, 37 I.I.C. 120 (2006). See Senftleben, *in* Dreier & Hugenholtz 2006, WCT note 6 (a).

207. E.C. Copyright in the Information Society Directive Art. 3(3).

208. *See* Van Eechoud et al. 2009, Chapter 9.

209. WIPO Copyright Treaty, Agreed Statement Concerning Article 8.

210. *See* WIPO National Seminar on Digital Technology and the New WIPO Treaties, August 22, 1997, WIPO/CNR/SEL/97/1, p. 7.

211. *See* §9.1.5, below.

answer a judgment, an action against a related party may be the copyright owner's most effective avenue for relief. As widely dispersed unauthorized uses of copyrighted works, such as "file sharing" over peer-to-peer networks on the Internet, become more common, and as the cost and inconvenience of negotiating with individual direct infringers grow too high, copyright owners may find that their only hope for relief lies in an action against the intermediary—software or equipment manufacturer, Internet service provider—whose services or products contributed to the direct infringement.

In the common law tradition, secondary liability takes the form of an exclusive authorization right. The British Copyright, Designs and Patents Act, for example, provides that "[copyright] in a work is infringed by a person who without the license of the copyright owner does, or authorizes another to do, any of the acts restricted by copyright."[212] A defendant may be held secondarily liable under the Act for importing, possessing, or dealing with an infringing copy;[213] providing means for making infringing copies;[214] permitting use of premises for an infringing performance;[215] and providing the apparatus for an infringing performance.[216] As a rule, in order to prevail the copyright owner must show that the defendant knew, or had reason to know, of the underlying infringement.

In the United States, secondary liability encompasses two distinct but overlapping theories—contributory infringement and vicarious liability. Contributory infringement occurs when "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."[217] Vicarious liability arises when a defendant's "right and ability to supervise" the infringing activity "coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge that the copyright monopoly is being impaired."[218] For a defendant to be held contributorily or vicariously liable, a direct infringement must have occurred.[219] In an important limitation on contributory infringement liability for the sale of equipment used in copyright infringement, the U.S. Supreme Court has ruled in a case involving videocassette recorders that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the

212. United Kingdom, Copyright, Designs and Patents Act 1988 §16(2).
213. United Kingdom, Copyright, Designs and Patents Act 1988 §§22, 23.
214. United Kingdom, Copyright, Designs and Patents Act 1988 §24.
215. United Kingdom, Copyright, Designs and Patents Act 1988 §25.
216. United Kingdom, Copyright, Designs and Patents Act 1988 §26.
217. Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).
218. Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963).
219. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434–442 (1984). *See generally* Goldstein 2005, §8.0.

product is widely used for legitimate unobjectionable purposes. Indeed, it need be merely capable of substantial noninfringing uses."[220]

Professor Cornish provides several examples of situations in which secondary liability has and has not been imposed in common law countries. "[P]eople who organise public entertainments by hiring musicians as independent contractors are likely to be authorising or permitting infringement if they simply leave the choice of music to the musicians. Accordingly they ought to procure an appropriate license from the Performing Right Society themselves or require the musicians to do so. Where the defendant is not the organiser of the entertainment, but only, for instance, the owner of the hall, he is unlikely to be held culpable if he is simply 'indifferent' to the choice of music. In other fields, authorising may also occur by implication. A person who transfers the serial rights in a book authorises their publication in that form, since the specific intent is apparent. . . . On the other hand, those who provide the copying machinery or the material for home taping will rarely be found to have the necessary control over what is then done, to be 'authorised.'" [221]

The civil law tradition of secondary liability is somewhat less defined than secondary liability in the common law tradition, but no less encompassing. Secondary liability in civil law jurisdictions will usually be based on general concepts of unlawful conduct. In Germany, the doctrine of *Störerhaftung* (liability for infringement), originally developed in property law, has given rise to extensive case law on the secondary liability of Internet service providers.[222] In the past, German law has imposed secondary liability on such activities as promoting a concert at which copyrighted works are performed without authority, operating a restaurant or dance hall where music is performed by live bands or jukebox, and the manufacture or sale of copying equipment, at least if the equipment lacks any substantial noninfringing use.[223]

Digital technologies for the storage, retrieval, and transmission of copyrighted works have intensified the conflict between copyright owners, concerned over their inability to police infringing activities in this new marketplace, and service providers, such as network operators, providers of

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220. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).
221. Cornish 1996, 369. (footnotes omitted).
222. *See, e.g.*, "Fake Rolexes" German Federal Supreme Court, March 11, 2004, Case I ZR 304/01. *See generally* Thomas Hoeren, *Liability for Online services in Germany*, 10 German Law Journal 561; Spindler & Leistner 2006.
223. *See, e.g.*, "*Personalausweise*," Federal Supreme Court, May 29, 1964, [1965] GRUR 106, *cited in* Dirk J.G. Visser, *Copyright Exemptions Old and New*, *in* Hugenholtz 1996, 49, 50. Alexander Liegl, Andreas Leupold & Peter Bräutigan, *Germany*, *in* Copyright Infringement 119, 162–164 (Susan Cotter, ed., 1997). *See also* Kamiel J. Koelman & P. Bernt Hugenholtz, *Online Service Provider Liability for Copyright Infringement*, Study prepared for WIPO, Geneva, December 1999; Spindler & Leistner 2006.

internet access and hosting services, search engines, and user-generated content platforms that provide the means and fora for this marketplace but are unable to monitor and control infringing activities of their subscribers. Amendments to the U.S. Copyright Act in 1998 reconcile the competing interests of copyright owners and service providers by carving out several safe harbors to balance the need of copyright owners to obtain effective relief against the need of service providers to pursue their largely noninfringing activities unencumbered by costly monitoring burdens.[224] The legislation immunizes the qualifying activities of defined "service providers" from otherwise available monetary relief and limits the availability of injunctive relief in prescribed circumstances. The provision extends this protection to five categories of online activity: transitory digital network communications; system caching; storage of information at the direction of users (hosting); use of information location tools (search engines); and specified activities of nonprofit educational institutions.

Internet service providers in the European Union have found similar refuge in the E.C. E-Commerce Directive that immunizes from liability three types of online intermediary activity: providing access ("mere conduit"), system caching, and hosting.[225] The Directive's immunities are both wider and narrower than the corresponding provisions of the DMCA. Unlike the U.S. law, the Directive has horizontal application—i.e., it encompasses the entire realm of civil and criminal liability, including liability for defamation. However, unlike the DMCA, the Directive does not cover search engines. Also, the Directive immunizes service providers from claims for monetary relief (damages) only and does not limit injunctive relief.[226]

Although it immunizes intermediaries under circumscribed conditions, the Directive does not harmonize substantive norms on liability, and providers that fail to qualify for immunity may or may not be held liable, depending on the operation of national law.

§9.1.6 Anti-circumvention Rules

The entertainment and information industry's gradual migration toward a network-based distribution model, together with growing concerns over the

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224. The Online Copyright Infringement Liability Limitation Act, enacted as Title II of the Digital Millennium Copyright Act (DMCA), Pub. Law 105-304, 112 Stat. 2860, 2877 (October 28, 1998) is codified as section 512 of the 1976 Copyright Act.

225. E.C. E-Commerce Directive Art. 12–14.

226. E.C. E-Commerce Directive Art. 12(3), 13(2), 14(3); *see also* E.C. Copyright in the Information Society Directive Art. 8(3): "Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right."

effectiveness of copyright in a digital environment, have prompted rights holders to look for alternative or supplementary strategies to protect their works. Contract law has rapidly become a regular companion to copyright protection as the structure of the Internet enables the formation of contract relationships between information producers and end users, either directly or through intermediaries. Apart from contracts, rights owners may employ a wide range of technological protection measures to protect their valuable content against unauthorized uses: encryption, passwords or special log-in procedures, anticopying devices, electronic "watermarks" are examples.

Just as fences invite fence hopping, so encryption invites hacking, and legislators have passed laws against the circumvention of technological measures used by rights owners to protect their content. Such measures have been controversial. According to one view, by applying technological measures that regulate access and control, a content owner replaces copyright "with a new, private regime of his own making that admits no exceptions and pays no heed to the public domain"[227] and effectively upsets the delicate balance between exclusivity and freedom that is copyright law's goal. Under the countervailing view, this degree of complete digital lock-up is an illusion; rights holders can earn no profit unless individuals are able to read, view, or listen to their works, and any individual who pays the price to do so will be free to copy from what he reads, views, or hears any public domain elements of the encrypted work and to make fair use, fair dealing, or otherwise excepted copies from the work as well.

The WIPO Treaties codify the principle of legal protection against unauthorized circumvention in an open-ended manner, leaving contracting states various options for implementation. Article 11 of the WIPO Copyright Treaty requires the contracting states "[to] provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights . . . and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."[228] Article 18 of the WIPO Performances and Phonograms Treaty makes comparable provision respecting the circumvention of technological measures employed by performers or producers of phonograms.[229] Although the WIPO Treaties do not

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227. Vinje 1996, 437.

228. Article 18 of the WIPO Performances and Phonograms Treaty contains similar language regarding neighboring rights.

229. The WIPO Copyright Treaty also obligates contracting parties to ensure the integrity of "rights management information," defined as "information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information when any of these items of information is attached to a copy of a work or appear in

require anti-circumvention rules within the legal framework of copyright, most contracting parties have elected to do so.

In 1998 the U.S. Congress implemented the WIPO Treaty provisions respecting anti-circumvention measures by adding a new Chapter 12 to Title 17 of the U.S. Code alongside—but not a part of—the U.S. Copyright Act.[230] Section 1201 provides separately for (a) technological measures that block unauthorized access to copyrighted works and (b) technological measures that block the unauthorized exercise of one or more of the rights secured by copyright. Sections 1203 and 1204 provide respectively for civil remedies and criminal penalties for violation of sections 1201.[231] By design, section 1201 has no effect on "rights, remedies, limitations, or defenses to copyright infringement, including fair use,"[232] and the provision does not "enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof."[233]

Section 1201(a), dealing with circumvention of access controls, encompasses both circumvention by conduct and circumvention by device. Specifically, section 1201(a)(1) provides that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title" and further provides for rulemaking by the U.S. Librarian of Congress to prescribe appropriate exemptions for individuals whose ability to make noninfringing uses of particular classes of works would otherwise be impaired. Section 1201(a)(2) prohibits the manufacture or traffic in any technology, product, service, or device that: is primarily designed or produced for the purpose of circumventing a technological access control; has "only limited commercially significant purpose or use" other than such circumvention; or is marketed for use in circumventing such a technological measure.

Where section 1201(a) deals with circumvention of technological measures protecting access to a work, section 1201(b) deals with circumvention of technological measures protecting "a right of a copyright owner." Section 1201(b) prohibits only the manufacture or sale of circumvention devices, not individual conduct aimed at circumvention. Like section 1201(a)(2), section 1201(b) seeks to avoid ensnaring products that have legitimate uses

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connection with the communication of a work to the public." WIPO Copyright Treaty Art. 12. *See also* WIPO Performances and Phonograms Treaty Art. 19.

230. The legislation appears in Title I of the Digital Millennium Copyright Act, Pub. Law 105-304, 112 Stat. 2860 (October 28, 1998).

231. Section 1202 implements Article 12 of the WIPO Copyright Treaty and Article 19 of the WIPO Performances and Phonograms Treaty by prohibiting the falsification, removal, or alteration of copyright management information, including information about the work's title, author, and copyright owner.

232. 17 U.S.C. §1201(c)(1) (2006).

233. 17 U.S.C. §1201(c)(2) (2006).

and prohibits the manufacture or distribution only of a technology, product, or service that: is primarily designed for the purpose of circumventing a technological measure that "effectively protects a right of a copyright owner"; has only a limited commercially significant use other than such circumvention; or is marketed for use in such circumvention.

Section 1201 carves out several exemptions from liability. Section 1201(f) exempts circumvention of both section 1201(a) access controls and section 1201(b) copy controls if the circumvention involves reverse engineering undertaken for the purpose of achieving interoperability between an independently created computer program and other programs. Section 1201(g) and (j) respectively exempt prescribed acts of encryption research and security testing from liability for circumventing—or producing devices to circumvent—access controls and section 1201(e) completely exempts specified law enforcement activities. Section 1201(d) creates an exemption from the prohibition against circumvention of access controls for a "nonprofit library, archives or educational institution which gives access to a commercially exploited copyrighted work solely in order to make a good faith determination of whether to acquire a copy of that work."

Article 6 of the E.C. Copyright in the Information Society Directive[234] requires legal protection of technical measures well beyond the WIPO Treaty minima, by including both access and copy control mechanisms.[235] Deviating from the American model, the European regime allows no exemptions to its prohibition on circumvention. Instead, the Directive (Article 6(4)) instructs member states to "take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned." Member states have transposed this provision in a variety of ways. While German law offers disenfranchised users relief through the civil courts, French law has established a High Authority, charged with mediating between right holders applying technological measures and users unable to exercise their user privileges specified under copyright law.[236]

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234. E.C. Copyright in the Information Society Directive of 2001 Art. 6. Art. 6 also goes further than the corresponding provision of E.C. Software Directive Art. 7(1)(c), which applies only to computer programs and is not affected by the later Directive.
235. E.C. Copyright in the Information Society Directive.
236. *See* Guibault et al. 2007. For national implementations, see Westkamp 2007.

§9.2 Neighboring Rights

As a rule, countries belonging to the common law tradition assimilate the rights granted to performers, phonogram producers, and broadcasters to the rights they grant to authors of literary and artistic works, while civil law countries protect these rights under the separate rubric of neighboring rights (*Leistungsschutzrechte* in German, *droits voisins* in French). Rights under both systems are, however, closely comparable. One reason is that copyright legislation in common law countries sometimes imposes limitations on these rights that it does not impose on traditional literary and artistic works. The U.S. Copyright Act withholds the public performance right from sound recordings except for rights in specified digital performances.[237] At the same time, the civil law countries, particularly as spurred by E.C. Directives, have increased the protection that they grant to neighboring rights to a point at which these rights often approach author's rights in rigor and effect.

The principal treaties that govern one or more of the neighboring rights in performances, phonograms, and broadcasts are the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, commonly called the Rome Convention,[238] Article 14 of the TRIPs Agreement,[239] and the WIPO Performances and Phonograms Treaty (WPPT).[240] Most civil law countries—and all Member States of the European Union—are parties to these treaties and often offer protection at standards well exceeding the Rome, TRIPs, and WPPT minima. The United States has adhered to the WTO TRIPs Agreement and the WPPT, but not to the Rome Convention.

In the European Union, the 1992 Directive on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property[241] harmonized the economic rights prescribed by the Rome Convention. The Directive protects not only the three traditional "Rome" categories (performing artists, phonogram producers, and broadcasting organizations) but adds film producers as a fourth category. Rights granted by the Directive generally follow the structure of the Rome Convention but tend to be more extensive, including, for example, a distribution right.

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237. U.S 1976 Copyright Act §106(4), (6).
238. On the scope of subject matter protected by this treaty see §3.2.1, above.
239. On the scope of subject matter protected by this treaty provision, see §3.4.1, above.
240. On the scope of subject matter protected by this treaty, see §3.2.3, above. On the coverage of the Geneva Phonograms Convention, see §3.2.2, above and §9.2.2, below.
241. Council Directive 92/100/EEC ("Rental Right Directive") November 19, 1992, O.J. L 346. The Directive has been replaced by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376, December 27, 2006, p. 28–35, which incorporates only minor technical changes.

The E.C. Copyright in the Information Society Directive of 2001, implementing the European Union's obligations under the WIPO Treaties, consolidates and extends existing economic rights, such as the right of reproduction, and also introduces new rights, such as the right of making available online.

§9.2.1 Rights of Performers

National legislation on performers' rights stems from various legal sources. Besides laws on neighboring rights, protection may derive from rules on unfair competition and unjust enrichment, criminal sanctions, and—in the common law countries—from copyright.[242] The governing treaties—the Rome Convention, the TRIPs Agreement, and the WIPO Performances and Phonograms Treaty—accommodate this variety by formulating the scope of guaranteed rights in the most general terms.

At the heart of the Rome Convention's promise to performers is that they will have the right to extract revenues from their work's first exploitation in any technological medium. Specifically, Article 7(1) obligates signatory countries to grant performers the "possibility of preventing" three discrete technological means of exploitation: "*(a)* the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation"; "*(b)* the fixation, without their consent, of their unfixed performance"; and "*(c)* the reproduction, without their consent, of a fixation of their performance: (i) if the original fixation itself was made without their consent; (ii) if the reproduction is made for purposes different from those for which the performers gave their consent; (iii) if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions."

Like the Rome Convention, the 1996 WIPO Performances and Phonograms Treaty obligates member countries to protect performers against the unauthorized fixation, broadcast, or communication of their performances. However, the WIPO Performances and Phonograms Treaty extends the Rome formula to encompass new technological means of exploitation by adding new definitions of "broadcasting,"[243] "communication,"[244]

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242. WIPO 1981, 34.
243. Article 2(f) of the WIPO Performances and Phonograms Treaty defines "broadcasting" as "the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also 'broadcasting'; transmission of encrypted signals is 'broadcasting' where the means for decrypting are provided to the public by the broadcasting organization or with its consent."
244. Article 2(g) of the WIPO Performances and Phonograms Treaty defines "communication to the public" of a performance or phonogram as "the transmission to the public by any

and "fixation."[245] Political rather than technological factors doubtless explain the decision to confine performers' fixation rights to audio fixation, leaving the question of audiovisual fixation to another day.

Article 6 of the Performances and Phonograms Treaty assures performers two exclusive rights in their unfixed performances: "(i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and (ii) the fixation of their unfixed performances."[246] Once a performance is fixed in a phonogram, performers are to have the exclusive right to authorize its "direct or indirect" reproduction "in any manner or form";[247] "the making available to the public of the original and copies" through "sale or other transfer of ownership";[248] "the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer";[249] and "the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them."[250]

Within the European Union, the E.C. Rental Right Directive obligates member states to grant performers the exclusive right to authorize or prohibit rental or lending of fixations of their performances.[251] This right may be freely transferred by the performer,[252] but the Directive provides that, where the performer has transferred the rental right to a phonogram or film

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medium, otherwise than by broadcasting, of sounds of a performance or the sounds of the representations of sounds fixed in a phonogram. For the purposes of Article 15, 'communication to the public' includes making the sounds or representations of sounds fixed in a phonogram audible to the public."

245. Article 2(c) of the WIPO Performances and Phonograms Treaty defines "fixation" as "the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device."
246. WIPO Performances and Phonograms Treaty Art. 6.
247. WIPO Performances and Phonograms Treaty Art. 7.

    According to the Agreed Statement of the Diplomatic Conference on this Treaty, "The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles." Diplomatic Conference on Neighboring Rights Questions, Agreed Statements Concerning the WIPO Performances and Phonograms Treaty, WIPO Document CRNR/DC/97, concerning Articles 7, 11 and 16 (December 23, 1996).
248. WIPO Performances and Phonograms Treaty Art. 8(1).
249. WIPO Performances and Phonograms Treaty Art. 9(1).
250. WIPO Performances and Phonograms Treaty Art. 10.
251. E.C. Rental Right Directive Art. 3(1)(b).
252. E.C. Rental Right Directive Art. 3(3).

producer, the performer retains, and cannot waive, the right to obtain an equitable remuneration for the rental.[253] The Directive also requires performers to receive the exclusive rights to authorize or prohibit the fixation of their performances;[254] to authorize or prohibit broadcast and communication of their performances to the public, "except where the performance is itself already a broadcast performance or is made from a fixation";[255] and to distribute fixations of their performances to the public.[256] The right to authorize or prohibit the direct or indirect reproduction of fixations of their performances that was initially required by the 1992 version of the Directive,[257] has been consolidated in the E.C. Copyright in the Information Society Directive, which applies both to copyright owners and owners of neighboring rights. The latter Directive has increased the level of protection offered to performers in the E.U., by extending the reproduction right to include temporary digital copies and by adding a right of making available online.[258]

Before the Performances and Phonograms Treaty, some, but far from all, countries granted moral rights to performers. The French Intellectual Property Code, for example, provided that "[a] performer shall have the right to respect for his name, his capacity and his performance."[259] The German Copyright Act provided, "A performer shall have the right to prohibit any distortion or other alteration of his performance of such nature as to jeopardize his standing or reputation as a performer."[260] The Performances and Phonograms Treaty now makes moral rights protection mandatory on adherents.[261]

§9.2.2 Rights of Phonogram Producers

Both the Rome Convention and the Geneva Phonograms Convention protect record producers against the unauthorized reproduction of their phonograms—"direct or indirect reproduction" in the case of the Rome Convention,[262] and "making of duplicates" in the case of the Phonograms

253. E.C. Rental Right Directive Art. 5(1),(2).
254. E.C. Rental Right Directive Art. 7(1).
255. E.C. Rental Right Directive Art. 8(1).
256. E.C. Rental Right Directive Art. 9(1)(a).
257. E.C. Rental Right Directive (1992, repealed) Art. 7(1).
258. E.C. Copyright in the Information Society Directive, Arts. 2(b) and 3(2).
259. France, Intellectual Property Code Art. L. 212-2.
See generally §10, below.
260. Germany, Copyright Act Art. 83.
261. WIPO Performances and Phonograms Treaty Art. 5.
262. Rome Convention, Art. 10. *See also* TRIPs Agreement Art. 14(2).
"As a minimum, the Rome Convention gives producers of phonograms the right to authorize or prohibit the reproduction of their phonograms, whether this is done by direct or indirect means. It was understood in Rome that this means a reproduction by use of the

Convention.[263] Unlike the Rome Convention, the Phonograms Convention provides for a public distribution right.[264] Unlike the Phonograms Convention, the Rome Convention provides for a performance right: "If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both."[265]

The WIPO Performances and Phonograms Treaty extends the rights of phonogram producers to new technological uses, much as it does with the rights of performers.[266] Like the Rome Convention and the TRIPs Agreement, the Performances and Phonograms Treaty provides that phonogram producers "shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their phonograms, in any manner or form."[267] Like the Phonograms Convention, the Performances and Phonograms Treaty establishes a commercial rental right[268] and, though in far less cumbered terms, a distribution right.[269] Finally, as with performers, the Performances and Phonograms Treaty promises phonogram producers "the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them."[270] The E.C. Directive on Rental Rights and Related Rights requires member states to give phonogram producers an exclusive rental and lending right with respect to their phonograms[271] and an exclusive right to distribute their phonograms to the public.[272] As with performers, the E.C. Copyright in the Information Society Directive consolidates and extends the reproduction right of phonogram producers to include temporary digital copies and also introduces a right of making available online.[273]

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matrix (direct), or by use of a record pressed therefrom, or by recording a radio or TV program which contains a phonogram (indirect)." WIPO 1981, 43.

263. Geneva Phonograms Convention Art. 2.
264. Geneva Phonograms Convention Art. 2. *Compare* TRIPs Agreement Art. 14(4).
265. Rome Convention Art. 12. Article 12 further provides, "Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration."
266. *See* §9.2.1, above.
267. WIPO Performances and Phonograms Treaty Art. 11.
268. WIPO Performances and Phonograms Treaty Art. 13.
269. WIPO Performances and Phonograms Treaty Art. 12.
270. WIPO Performances and Phonograms Treaty Art. 14.
271. E.C. Rental Right Directive Art. 3(1)(c).
272. E.C. Rental Right Directive Art. 9(1)(b).
273. E.C. Copyright in the Information Society Directive, Arts. 2(c) and 3(2).

§9.2.3 Rights of Broadcasting Organizations

Article 13 of the Rome Convention and Article 14(3) of the TRIPs Agreement prescribe, in roughly comparable terms, the minimum rights that member countries must give to broadcasting organizations in connection with their broadcasts.[274] The TRIPs Agreement states the pivotal requirements in broader terms than does the Rome Convention, giving broadcasters "the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same."[275] The E.C. Rental and Related Rights Directive requires member states to grant broadcasting organizations the exclusive right to fix their broadcasts, "whether these broadcasts are transmitted by wire or over the air, including by cable or satellite".[276] The Directive also requires the grant of public rebroadcast and communication rights[277] and public distribution rights[278] to broadcasters. As with performers and phonogram producers, the E.C. Copyright in the Information Society Directive consolidates and extends the reproduction right of broadcasting organizations to include temporary digital copies and also introduces a right of making available online.[279]

§9.2.4 Other Neighboring Rights

Outside the neighboring rights of performers, phonogram producers, and broadcasters is a potpourri of rights that neighbor on copyright and author's right. The European continent offers the greatest profusion of such rights, in part because the European Union's harmonizing efforts have generally brought protection to the highest level reached in one or more states, rather than to the lowest common denominator. For example, drawing in part on earlier French and German practice, the E.C. Rental and Related Rights Directive and E.C. Copyright in the Information Society Directive jointly

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274. For several years, international negotiations have aimed at concluding a WIPO Broadcasting Treaty that would grant broadcasters protection against a variety of digital uses. The proposal has met with staunch opposition from a coalition of developing nations and various user groups and is unlikely to be converted into a treaty any time soon. *See* Patrícia Akester, *The Draft WIPO Broadcasting Treaty and its Impact on Freedom of Expression*, UNESCO e-Copyright Bulletin, April–June 2006.
275. TRIPs Agreement Art. 14(3).
276. E.C. Rental Right Directive Art. 7(2).
277. E.C. Rental Right Directive Art. 8(3).
278. E.C. Rental Right Directive Art. 9(1)(d).
279. E.C. Copyright in the Information Society Directive, Arts. 2(e) and 3(2).

grant film producers the exclusive rights to rent and lend copies of their films,[280] to reproduce the films directly or indirectly,[281] and to distribute copies of the films to the public.[282] Article 4 of the E.C. Term Directive provides that anyone who, following the expiration of copyright in unpublished works such as private letters, publishes "or lawfully communicates [them] to the public" for the first time shall enjoy protection equivalent to author's economic rights, subject however to a shortened term, 25 years from publication.[283] British law grants publishers copyright in the typographical arrangement of published editions principally as a means for protecting their investment in producing editions of public domain works.[284] The German Act grants rights comparable to copyright to authors who produce materially new editions of public domain works[285] and to publishers who publish previously unpublished works in which the copyright has expired.[286]

Economically, probably the most significant of the nonconventional neighboring rights is the one that the E.C. Database Directive gives to a database maker "to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database."[287] The Directive defines extraction as "the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form." The right pertains to the downloading, copying, printing, or any other reproduction in whatever (permanent or temporary) form. The Directive defines reutilization as "any form of making available to the public all or a substantial part of the contents of a

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280. E.C. Rental Right Directive Art. 3(1)(d).
281. E.C. Copyright in the Information Society Directive Art. 2(d).
282. E.C. Rental Right Directive Art. 9(1)(c).
283. E.C. Term of Protection Directive, Art. 4.

    Article 5 of the Term of Protection Directive provides: "Member States may protect critical and scientific publications of works which have come into the public domain. The maximum term of protection of such rights shall be 30 years from the time when the publication was first lawfully published."
284. United Kingdom, Copyright, Designs and Patents Act 1988 §1(1)(c). *See* Skone James et al. 1991, §§2-36 through 2-37.
285. Germany, Copyright Act Art. 70.
286. Germany, Copyright Act Art. 71.
287. E.C. Database Directive Art. 7(1).

    Article 7(2)(a) of the Database Directive defines "extraction" to mean "the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form" and Article 7(2)(b) defines "re-utilization" to mean "any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community; Public lending is not an act of extraction or re-utilization."

    On the E.C. Database Directive generally, see §6.2.4, above.

database by the distribution of copies, by renting, by on-line or other forms of transmission."

The Database Directive does not define "substantial." According to the Explanatory Memorandum "no fixed limits can be placed in this Directive as to the volume of material which can be used."[288] This "substantial part" test becomes especially problematic in cases where only few data are taken, but the extracted data represent significant economic value nonetheless. Does this amount to the extraction of a substantial part? In its landmark decision on the existence and scope of the database right, *British Horseracing Board v. William Hill*,[289] the European Court of Justice answered this question in the negative. In considering what constitutes a qualitatively substantial part of a database, the Court ruled that "it must be considered whether the human, technical and financial efforts put in by the maker of the database in obtaining, verifying and presenting those data constitute a substantial investment."[290] "[T]he intrinsic value of the data affected by the act of extraction and/or re-utilisation does not constitute a relevant criterion for assessing whether the part in question is substantial, evaluated qualitatively." [291]

Although the databases right is *sui generis*, it sometimes draws on traditional author's right concepts. For example, echoing Article 9(2) of the Berne Convention,[292] Article 7(5) of the E.C. Database Directive provides: "The repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted."[293] According to the European Court of Justice this provision is meant to prevent repeated acts by a user, which would lead to "the reconstitution of the database as a whole or, at the very least, of a substantial part of it."[294]

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288. Proposal for a Council Directive on the Legal Protection of Databases, COM (92) 24 final, Explanatory Memorandum, at 52.
289. British Horseracing Board v. William Hill Organization, European Court of Justice, November 9, 2004, Case C-203/02, ECR [2004] I-10415. *See* Mark J. Davison and P. Bernt Hugenholtz, *Football fixtures, horseraces and spin-offs: the ECJ domesticates the database right*, [2005] E.I.P.R. 113.
290. *Id*., § 76.
291. Id., § 78.
292. *See* §11.1, below.
293. E.C. Database Directive Art. 7(5). *See also* E.C. Database Directive, Article 9, carving out exemptions comparable to those under author's right and copyright for fair dealing and private use.
294. British Horseracing Board v. William Hill Organization, European Court of Justice, November 9, 2004, Case C-203/02, § 87.

CHAPTER
10

Moral Rights

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Moral rights secure the bond between an author and his work through several legal ties.[1] Two of these rights, required of all Berne Union members since the 1928 Rome Act, are the author's right to claim paternity, or authorship, of his work[2] and his right to the work's integrity, to object to any distortion of the work.[3] Both rights are secured by Article 6*bis* of the 1971 Paris Act. Many countries also recognize a moral right of divulgation, or disclosure,[4] and some recognize a right to withdraw the work from circulation if it no longer represents the author's views.[5] Although moral right has traditionally been associated with protection of authors in connection with their works, the WIPO Performances and Phonograms Treaty requires the grant to performers of paternity and integrity rights in their "live aural performances or performances fixed in phonograms."[6]

Civil law systems, with their ostensible deference to authors' natural rights, combined with a deeply rooted tradition of protecting interests in privacy and personality, are commonly thought to provide more rigorous moral rights protection than common law systems, with their reputed utilitarian bent. Nonetheless, many common law countries, with their own historic regard for authors' natural rights,[7] have established an effective, if less deeply rooted, body of doctrine protecting authors' reputational interests. In 1931, Canada enacted moral rights legislation closely patterned after Berne Article 6*bis*, and the current Copyright Act prescribes fully elaborated protections for the rights of integrity and paternity.[8] Australia introduced the rights of attribution and integrity into its copyright legislation in 2000.[9]

The 1988 Copyright, Designs and Patents Act in the United Kingdom provides discrete rights of integrity and paternity and against false attribution.[10]

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1. There is an abundant literature on moral right in English. *See, e.g.*, Dietz 1993;Dworkin 1994; Gerald Dworkin, *The Moral Right and English Copyright Law*, 12 I.I.C. 476 (1981); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 Harv. L. Rev. 554 (1940); Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists under French Law*, 16 Am. J. Comp. L. 465 (1968); Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 Bull. Copr. Soc. 1 (1980); William Strauss, *The Moral Right of the Author*, 4 Am. J. Comp. L. 506 (1955); Stig Strömholm, *Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint*, 14 I.I.C. 1 (1983); David Vaver, *Authors Moral Rights in Canada*, 14 I.I.C. 329 (1983); Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 Harv. Int'l L.J. 353 (2006).
2. *See* §10.1, below.
3. *See* §10.2, below.
4. *See* §10.3, below.
5. *See* §10.4, below.
6. WIPO Performances and Phonograms Treaty Art. 5(1). *See* §9.2.1, above.
7. *See* §2.1, above.
8. Canada, Copyright Act §§14.1, 28.1.
9. Australia, Copyright Act §§189–195 AZR.
10. United Kingdom, Copyright, Designs and Patents Act 1988 §§77–89, 94–95, 103.

The United States has steadfastly resisted the literal incorporation into national law of the rights secured by Article 6*bis* of the 1971 Paris Act,[11] and it has instead taken the position that a mix of federal and state laws, including derivative rights, unfair competition, defamation, and privacy, in practice approximate the rights of paternity and integrity. Paradoxically, American courts have lowered the level of moral rights protection that prevailed at the time the United States adhered to the Berne Convention. In one case,[12] the U.S. Supreme Court effectively crippled American law's most effective doctrinal support for the author's moral right of attribution.[13]

In 1990, the U.S. Congress did add a provision to the Copyright Act, granting rights of attribution and integrity to "works of visual art."[14] The rights granted by the 1990 amendments to works of visual art are at first glance as robust as the moral rights given under any other legal system in the world. But the reach of these rights is in fact sharply restricted, for the Act effectively equates works of visual art with works of fine art and defines that class to include works that exist in only a single copy or that are published in signed and numbered editions of no more that 200 copies;[15] further, the Act subjects the rights to sweeping limitations, exempting from liability virtually all significant commercial uses of artistic works, including their reproduction in books, magazines, newspapers, motion pictures, and works made for hire.[16]

Just as the common law countries have admitted strains of natural right into their protection of author's reputational interest, so civil law countries on the European continent have bowed to utilitarian principle in creating expedient exceptions from moral right. Dr. Adolf Dietz has demonstrated that criteria comparable to the balancing factors employed in American fair use doctrine[17] have been employed in determining appropriate limitations on moral right, in particular the right of integrity: the "nature and intensity of

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11. The United States succeeded in limiting the TRIPs Agreement's incorporation of the minimum rights guaranteed by the Berne Convention to economic rights only. *See* Gervais 1998, 72.
12. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S.23 (2003).
13. *See* §10.1, below.
14. U.S. 1976 Copyright Act §106A.
15. U.S. 1976 Copyright Act §101.
16. U.S. 1976 Copyright Act §106A(c)(3).

    Section 106A(d) limits the duration of the rights of attribution and integrity to the life of the author, a departure from Berne Article 6*bis*(2), which requires the rights of integrity and attribution to remain in force after the author's death "at least until the expiry of the economic rights." In the United States, in the usual case, this means seventy years after the author's death. While Article 6*bis*(2) allows a country, which at the time it adhered to the Paris Act of the Convention protected neither the right of integrity nor the right of attribution after the author's death, to terminate one of these rights on the author's death, section 106A provides for termination of both rights on the author's death.
17. *See* §11, below.

modifications of or other interference with the work, as well as its reversible or irreversible character; the number of people or the size of the public addressed by the use of the infringing work; the fact whether the author created the work in an employment relationship or as a self-employed author or, else, whether a commissioning party had or had not decisive influence onto the final result of the creation; also the possible consequences for the professional life of the author, and, of course, for his honor and reputation have to be taken into consideration."[18]

Moral rights, concerned with an author's reputation, frequently overlap the economic rights, which are concerned with a work's exploitation.[19] Nonetheless, moral rights have distinct jurisprudential roots. For example, while national legislatures universally condition their protection of economic rights in published foreign works on the presence of a treaty point of attachment,[20] they may choose not to insist on this *quid pro quo* in the case of moral rights. The German Author's Rights Act, for example, will protect the integrity, paternity, and disclosure rights of foreign authors even though the work in issue has no point of attachment under any applicable treaty.[21] French law similarly treats moral right as universal in nature,[22] overriding at times even rules of contractually applicable law.[23]

As deeply entrenched as moral rights are in the traditions of the civil law countries that make up most of the membership of the European Union,[24] existing disparities between moral rights regimes across the European Union are not considered to sufficiently impede the Internal Market to justify yet another harmonization exercise. Also, moral rights' proximity to nonharmonized terrain such as contract law may play a role here. In any event harmonization of moral rights is not likely to occur in the near future.[25]

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18. Adolf Dietz, *Legal Principles of Moral Rights (Civil Law)*, *in* A.L.A.1., The Moral Right of the Author, Congress of Antwerp (September 19–23, 1993) 54, 78 (1994).
19. For example, the economic right to control the creation of derivative works can to some degree serve as a surrogate for the right of integrity. *See generally* Paul Goldstein, *Derivative Rights and Derivative works in Copyright*, 30 J. Copr. Soc'y 209 (1983).
20. *See* Chapter 5, above.
21. *See, e.g.*, Germany, Copyright Act Art. 121(6).
22. *See* Pollaud-Dulian 1990, 154.
23. *See* Angelica, Daniel, Walter Huston, SACD et al. v. la Société Turner Entertainment, La Société exploitation de la cinquième chaîne (La Cinq) et al, Cour de Cassation, May 28, 1991, I.I.C. (1992), 702 (colorization of John Huston movie originally shot in black & white deemed infringement of film director's moral right, even if contractually applicable U.S. law did not recognize director as author of the film). *See* Ginsburg & Sirinelli 1991.
24. *See* Marjut Salokannel and Alain Strowel, Study contract concerning moral rights in the context of the exploitation of works through digital technology, Report for the European Commission (2000).
25. See European Commission, *Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights*, at 16, SEC (2004) 995 (July 19, 2004).

§10.1 Right of Paternity

Article 6*bis*(1) of the Berne Paris Text requires member states to give authors "the right to claim authorship of the work."[26]

The WIPO *Guide to the Berne Convention* calls this the "first and foremost" of the moral rights and underscores that the right "may be exercised by the author as he wishes; it can even be used in a negative way i.e., by publishing his work under a pseudonym or by keeping it anonymous, and he can, at any time, change his mind and reject his pseudonym or abandon his anonymity."[27] Even functional, architectural works command the right, and one German decision has held that an architect could require his name to be included on a large public building he had designed.[28]

The French Intellectual Property Code speaks of the author's "right to respect for his name, his authorship and his work,"[29] and the German Act speaks of the author's "right of recognition of his authorship of the work."[30] In civil law countries, where the paternity right is nonwaivable, a coauthor or ghostwriter who has contractually foregone his right to be named as an author may subsequently revoke the waiver and assert the attribution right.[31]

The U.K. Copyright, Designs and Patents Act employs a far more detailed prescription,[32] subjects the right to several exceptions,[33] and conditions the right on the author's assertion of it in the prescribed manner.[34] The Australian Copyright Act grants authors both the right to be identified in connection with their works[35] and the right not to have someone else identified as the work's author;[36] the Act also specifies factors that may excuse attribution in a particular case.[37] Canada's Copyright Act limits the exercise of its attribution right to acts falling within the statute's economic rights;[38] like the Australian Act, it subjects its right of attribution to reasonable and circumstantial exceptions.[39]

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26. Berne Convention, 1971 Paris Text Art. 6*bis*(1).
27. WIPO 1978, 41.
28. *Namensnennungsrecht des Architekten* ("Architect's Right to Be Named"), German Federal Supreme Court, June 16, 1994, Case No. I ZR 3/92, 27 I.I.C. 130 (1996).
29. France, Intellectual Property Code Art. L 121-1.
30. Germany, Copyright Act Art. 13. ("He may decide whether the work is to bear an author's designation and what designation is to be used.")
31. *See* Pollaud-Dulian 1990, 174–176.
32. United Kingdom, Copyright, Designs and Patents Act 1988 §77.
33. United Kingdom, Copyright, Designs and Patents Act 1988 §79.
34. United Kingdom, Copyright, Designs and Patents Act 1988 §78.
35. Australia, Copyright Act §193.
36. Australia, Copyright Act §§195 AC, 195 AD.
37. Australia, Copyright Act §§195 AR (2),(3) (Among the factors to be considered are the nature of the work and the purpose for which it is used, relevant industry practice, and the expense required to identify the author.).
38. Canada, Copyright Act §14(1).
39. Canada, Copyright Act §14(1) ("where reasonable in the circumstances").

The U.S. Copyright Act gives the author of a work of visual art a right of attribution—"to claim authorship of that work"—and a right against misattribution—"to prevent the use of his or her name as the author of any work of visual art which he or she did not create."[40] The Act also gives the visual artist a right against the association of his name with a work that he did in fact create "in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation."[41] However, the Act's unusually narrow definition of works of visual art closely circumscribes this provision.

Outside the limited scope of protection that the U.S. Copyright Act gives to creators of works of visual art, authors' paternity interests in the United States derive some modest protection from contract and unfair competition law. Courts will enforce contract provisions obligating a licensee to attribute a work to its author; however, absent an express duty of attribution, courts will not as a rule imply such a duty.[42] Although courts at one time applied the federal Trademark Act's prohibition of misrepresentations in the sale of goods or services[43] against the distribution of a work without a correct attribution of authorship,[44] in 2003, the Supreme Court so narrowly construed the Trademark Act's formula for misrepresentations of origin that the provision today fails even roughly to approximate the attribution right required by Article 6*bis* of the Berne Convention.[45] The defendant in the case had, without authority, copied and edited plaintiff's *Crusade in Europe* television series (the series was in the public domain because its owner had failed to renew the copyright under the then-mandatory U.S. renewal provisions), but it had nowhere on its DVD packaging given credit to the plaintiff's creative employees, substituting instead its own name and screen credits. Defendant was free to do so, the Supreme Court ruled, because the phrase "origin of goods" in the relevant provision of the Trademark Act "refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods."[46]

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40. U.S. 1976 Copyright Act §106A(a)(1).
41. U.S. 1976 Copyright Act §106A(a)(2).
42. *See, e.g.*, Vargas v. Esquire, Inc., 164 F. 2d 522, 526 (7th Cir. 1947).
43. 15 United States Code §1125(a) (2006).
44. *See, e.g.*, Lamothe v. Atlantic Recording Corp., 847 F.2d 1403 (9th Cir. 1988); Smith v. Montoro, 648 F.2d 602, 605 (9th Cir. 1981) ("'Implied' reverse passing off occurs when the wrongdoer simply removes or otherwise obliterates the name of the manufacturer or source and sells the product in an unbranded state.").
45. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).
46. 539 U.S. at 37.

§10.2 Right of Integrity

Article 6*bis*(1) of the Berne Paris Text obligates member countries to secure to authors, with respect to their works, the right "to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[47] In a parallel provision, Article 5 of the WIPO Performances and Phonograms Treaty requires, at a minimum, protection of a performer's right "to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation."[48]

Countries vary in the rigor with which they formulate and apply the right of integrity. The French right, which Dr. Dietz characterizes, "at least in theory," as "the most absolute and unconditional one,"[49] speaks simply of the author's "right to respect for his name, his authorship and his work."[50] Other civil law countries phrase the right broadly but limit it by the condition, expressly permitted by Berne, that the distortion be prejudicial to the author's honor or reputation.[51] As a rule, courts in these countries employ an objective, rather than subjective, measure of prejudice in order to discourage lawsuits by overly sensitive authors or authors seeking to use moral right as a lever to extract some unrelated personal or economic advantage. Germany, which follows this approach, applies it to licensees as well as to third parties. Section 39(2) of the German Copyright Act provides that alterations to a work and its title "which the author cannot reasonably refuse shall be permissible."

While all civil law countries rigorously protect the moral right of integrity, uncertainties persist about its precise scope. A particularly controversial issue concerns the complete destruction of original works of visual art or buildings. For example, the Supreme Court of the Netherlands has held that the "complete destruction of an object incorporating a copyright protected work can not be qualified as a distortion of the work" as contemplated in the Dutch Copyright Act.[52] However, "in case of originals, as with buildings, circumstances may demand that the owner only proceeds to destruction if he has reasonable grounds to do so, taking into account the interests of the author by either adequately documenting the work of architecture, or giving the author an opportunity to do so."

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47. Berne Convention, 1971 Paris Text Art. 6*bis*(1).
48. WIPO Performances and Phonograms Treaty Art. 5(1).
49. Dietz 1993, 13.
50. France, Intellectual Property Code Art. L. 121-1.
51. *See, e.g.*, Spain, Copyright Act Art. 14(iv).
52. Netherlands, Copyright Act Art. 25(1)(d); Jelles v. Zwolle, Supreme Court, February 6, 2004, Case C02/282HR, E.I.P.R. Volume 26 (2004), No. 12, p. N-155–156 (destruction of municipal building designed by architect Jelles not deemed infringement of moral right). *See generally* Ricketson 1987, 470.

The right of integrity, like moral rights generally, has a less secure foothold in common law than in civil law countries. The U.K. 1988 Copyright, Designs and Patents Act vests its right against "derogatory treatment" in authors of copyrighted literary, dramatic, musical, and artistic works and directors of copyrighted films, and it differentiates among several classes of works.[53] The Act defines "treatment" to exclude translation of literary or dramatic works and modest alteration of musical works, and it equates "derogatory" with an act that constitutes "distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director."[54] The Canadian Copyright Act follows the Berne formulation and requires that, to prevail in a distortion claim, the author must demonstrate prejudice to his honor or reputation,[55] as does the Australian Copyright Act.[56] However, in the case of paintings, sculpture, and engravings, the Canadian Act creates a presumption of prejudice arising out of distortion, mutilation, or other modification.[57]

Taken together, several provisions of the U.S. Copyright Act somewhat approximate the moral right of integrity. In the case of qualifying works of visual art, the Act creates a right against "intentional distortion, mutilation, or other modification" that would be prejudicial to the honor or reputation of the artist.[58] Another provision of the Act carves out a limited right against the distortion of nondramatic musical works by denying a mechanical license to make and distribute phonorecords if the compulsory licensee's arrangement of the copyrighted work will "change the basic melody or fundamental character of the work."[59] The Act's grant of an exclusive right to prepare derivative works[60] encompasses unauthorized distortions of the work along with garden variety translations, abridgements, and adaptations; paradoxically, the more extreme the distortion is, the less it can be said to be based on the original and thus to infringe the derivative right in the original.

Federal and state unfair competition law in the United States may also protect an author's interest in the integrity of his work. In *Gilliam v. American Broadcasting Companies, Inc.*,[61] a leading case under federal unfair competition law, the court partially rested its decision for plaintiff on the ground that the defendant's severely edited version of television programs based on plaintiff's *Monty Python* scripts "impaired the integrity" of the work "and

53. United Kingdom, Copyright, Designs and Patents Act 1988 §§80–82.
54. United Kingdom, Copyright, Designs and Patents Act 1988 §80.
55. Canada, Copyright Act §28.2(1).
56. Australia, Copyright Act §195 AJ(a).
57. Canada, Copyright Act §28.2(2).
58. U.S. 1976 Copyright Act §106A(a)(3)(A).
59. U.S. 1976 Copyright Act §115(a)(2). On the musical compulsory license generally, *see* §11.4.5, above.
60. U.S. 1976 Copyright Act §106(2).
61. 538 F.2d 14 (2d Cir. 1976).

represented to the public as the product of appellants what was actually a mere caricature of their talents." The court concluded that "a representation of a product, although technically true," will violate the Trademark Act if it "creates a false impression of the product's origin," and that the provision applies to "the situation in which a television network broadcasts a program properly designated as having been written and performed by a group, but which has been edited, without the writer's consent, into a form that departs substantially from the original work."[62]

§10.3 Right of Divulgation

Implicit in the economic rights of reproduction, public performance, and distribution is a right of divulgation through which authors can control the terms under which their works are first disclosed to the public. Several countries, predominantly in the civil law world, add a moral right of divulgation to the economic right of first publication.[63] The moral right of divulgation augments the economic right in two ways. First, it insulates the unpublished work from exemptions and other limitations that might be permitted under the economic right.[64] Second, in countries such as France and Germany that extend moral right to all authors regardless of a treaty point of attachment, the divulgation right can serve as an important ground for protection where treaty-based protection is unavailable. At least under French practice, the disclosure right has an affirmative as well as a prohibitory aspect, and the legislative prescription that "the author alone shall have the right to divulge his work"[65] has been interpreted to give creators of commissioned works not only the right to decline to complete the commission, but also the right to complete the work under the auspices of the commissioning party.[66]

As a rule, common law countries do not extend a discrete moral right of disclosure. At one time, common law copyright, a doctrine deeply rooted in natural rights philosophy,[67] anchored the right of first publication but, since its virtually complete preemption in the common law world, the right has

62. 538 F.2d at 24 (2d Cir. 1976).
63. *See, e.g.*, France, Intellectual Property Code Art. L. 121-2; Germany, Copyright Act Art. 12(2).
64. *See generally* Chapter 11, below.
The Berne Paris Text, though not including the right of divulgation among the minimum moral rights of Article 6*bis*, partially secures the right in provisions like Articles 10 and 10*bis*, which effectively limit their exemptions to published works.
65. France, Intellectual Property Code Art. L. 121-2.
66. *See* Pollaud-Dulian 1990, 162–170.
67. *See* §2.1, above.

occupied the interstices of the statutory economic rights. The U.S. Copyright Act's exclusive right to distribute copies of a work to the public[68] effectively gives an author the right to control the first publication of his work and thus closely approximates the right of disclosure under continental moral right doctrine. This right may enjoy a preferred place in the Act's hierarchy of rights, for the U.S. Supreme Court has held that unpublished works enjoy special protection against section 107's fair use defense.[69] According to the Supreme Court, it was not a fair use for the defendant to copy approximately 300 words from plaintiff's copyrighted but unpublished memoirs. "It is true," the Court ruled, "that common-law copyright was often enlisted in the service of personal privacy. In its commercial guise, however, an author's right to choose when he will publish is no less deserving of protection. The period encompassing the work's initiation, its preparation, and its grooming for public dissemination is a crucial one for any literary endeavor. . . . The obvious benefit to author and public alike of assuring authors the leisure to develop their ideas free from fear of expropriation outweighs any short-term 'news value' to be gained from premature publication of the author's expression."[70]

Section 202 of the U.S. Copyright Act, providing that transfer of ownership of a material object, such as a manuscript or painting, does not of itself convey rights in the copyrighted work embodied in the material object, further secures the author's control of the right of first publication.[71]

§10.4 Right of Withdrawal

Only a small number of countries, including France, Germany, Italy, and Spain—all in the civil law world—grant authors an explicit moral right to withdraw their work from circulation, typically in situations when the work no longer accurately reflects the author's views.[72] Where granted, the right may be conditioned on indemnification of the work's publisher for losses suffered as a consequence of withdrawal. For example, the French provision on *droit de repentir* provides:

> Notwithstanding assignment of his right of exploitation, the author shall enjoy a right to reconsider or of withdrawal, even after publication of his work, with respect to the assignee. However, he may only exercise that right on the condition that he indemnify the assignee beforehand for any prejudice the reconsideration

68. U.S. 1976 Copyright Act §106(3).
69. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985).
70. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 554–555 (1985).
71. U.S. 1976 Copyright Act §202.
72. Dietz 1993, 4.

> or withdrawal may cause him. If the author decides to have his work published after having exercised his right to reconsider or of withdrawal, he shall be required to offer his rights of exploitation in the first instance to the assignee he originally chose and under the conditions originally determined.[73]

At least as measured by the case law, the right of withdrawal is rarely asserted. The U.S. Copyright Act's termination of transfer provisions roughly approximate the civil law right of recall by giving authors and their statutory successors a nonwaivable right to terminate copyright transfers after a specified period.[74]

§10.5 Limitation and Waiver of Moral Rights

In most countries an author's moral rights are doctrinally separate from his economic rights, a fact reflected in the opening phrase of Berne Article 6*bis*(1) guaranteeing the rights of attribution and integrity "[i]ndependently of the author's economic rights, and even after the transfer of said rights."[75] Although there is a popular tendency to view moral rights as absolute, legislation in only a few countries even approaches this extreme. The most frequentlycited example is France where, by statute, the right is described as "perpetual, inalienable and imprescriptible."[76] In fact, moral right in most countries lasts no longer than the author's economic rights[77] and, even if not generally alienable, may sometimes be subject to waiver.[78] Waiver aside, moral rights are also regularly subjected to exemptions that, though not as numerous or broad as those for economic rights, nonetheless accommodate the exigencies of commerce.[79]

§10.5.1 Waiver

National legislation divides on the author's power to waive his moral rights. At one extreme are some of the civil law countries, led by France, which

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73. France, Intellectual Property Code Art. L. 121-4.
74. U.S. 1976 Copyright Act §§203, 304(c). *See generally* §7.6.1.2, above.
75. Berne Convention, 1971 Paris Text Art. 6*bis*(1).
76. France, Intellectual Property Code Art. L. 121-1. *See, e.g.*, Court of Cassation, January 28, 2003, 196 R.I.D.A. 414 (2003) (inalienable nature of the right of integrity held to be "a principle of public policy").
77. Under Article 6*bis*(2) of the Berne 1971 Paris Text, the rights of paternity and integrity secured by Article 6*bis*(1) are to be maintained after the author's death, "at least until the expiry of the economic rights."
    See generally Chapter 8, above.
78. *See* §10.5.1, below.
79. *See* §10.5.2, below.

impose a virtually absolute bar on waiver.[80] In the intermediate category are civil law countries that permit waiver in circumstances where it would be unjust not to do so. Germany, for example, "allows waiver within certain limits, determined partly by proper usage, partly by a balancing of interests."[81] At the other end of the spectrum, common law countries freely allow waiver of moral rights.[82]

As a practical matter, waiver at least of the moral right of integrity will be an all but inevitable element of the relationship between an author and his publisher, since the production of a book, sound recording, or motion picture will necessarily alter the author's original work to some degree, and publication of the work is the ultimate object of the author-publisher relationship. This suggests that, by entering into such a relationship, the author effectively waives the rights of integrity and attribution, at least to the extent reasonably dictated by the terms of the relationship. Article 39(2) of the German Copyright Act posits, as a rule of law, a proposition that elsewhere is doubtless implied in fact: that the publisher or other licensee is presumed to enjoy the privilege of altering the work within reasonable bounds.

§10.5.2 Limitations

Moral rights are not nearly as monolithic as is commonly thought, and actions against third parties are tempered in civil law as well as common law countries by a balancing of interests akin to the balance struck for economic rights by doctrines such as fair dealing and fair use.[83] Reviewing legislative exceptions to moral right in the civil law countries, Adolf Dietz has concluded that they "only exemplify the concept that moral rights questions have always to be judged in their individual context and that correspondingly different solutions have to be found for different categories of works and manners of work uses."[84] For example, while moral rights are in civil law deemed unwaivable and nontransferable, it is generally accepted that a license granted to adapt a work implies a degree of freedom to the adapter.[85]

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80. France, Intellectual Property Code Art. L. 121-1; Spain, Copyright Act Art. 14.
81. Dietz 1993, 12.
82. *See generally* Dworkin 1994, 18.
83. This comparison has been advanced by Dr. Adolf Dietz. *See* Dietz 1993, 15. On fair dealing and fair use, see §§ 11, 11.2.1, below.
84. Dietz 1993, 14–15.
85. *See, e.g.*, France, "Le petit prince," Court of Cassation, June 12, 2001, 191 R.I.D.A. 266 (2002) (contract allowing animated film adaptation of Saint-Exupéry's work *The Little Prince* implies "a degree of freedom afforded to the adapter," moral rights notwithstanding).

Motion pictures provide a prominent example of how civil law countries extensively accommodate moral rights to the exigencies of the marketplace.[86] These countries have carved out similarly broad exemptions for works, such as computer programs and architecture, that occupy the borderland between literary or artistic property and industrial property.[87] Parody, which might be considered a direct assault on an artist's interest in the integrity of his work, has been widely accepted in civil law jurisprudence as an accepted and important literary genre that will not infringe moral right so long as it remains true to its central, critical purpose.[88] In general, however, these accommodations are not as extensive as those made in common law countries.[89]

86. *See, e.g.*, France, Intellectual Property Code Art. L. 121-6; Germany, Copyright Act Art. 93.
87. France, Intellectual Property Code Art. L. 121-7; Italy, Copyright Act Art. 20.
88. *See* Françon 1998, 286. *See* §11.4.1 below.
89. *See generally* Dworkin 1994.

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CHAPTER
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The general contours of copyright law define the subject matter scope and duration of an author's economic rights. But every country's copyright system also embodies limitations on these exclusive rights to accommodate a variety of cultural, social, technological, economic, and political needs and objects. No less than copyright itself, properly calibrated limitations on copyright serve copyright law's basic goal to put copyrighted works to their most beneficial use by enabling new generations of authors to build on the works of authors who preceded them.

Limitations in national law take different forms, varying from the precisely circumscribed exceptions commonly found in countries of the *droit d'auteur* tradition to the more flexible "fair dealing" or "fair use" exemptions of the common law tradition. The governing treaties permit these exceptions to copyright, within limits, but do little to harmonize them. The Berne Convention recognizes a number of limitations found in almost every national law, such as the mandatory "quotation right" of Article 10(1), but also gives some discretion to the contracting states to carve out limitations tailored to local needs. Neighboring rights treaties provide even less guidance. For example, Article 15 of the Rome Convention lists a handful of basic limitations for private use, news reporting, ephemeral recording, and teaching but also allows contracting parties to "provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works."[1]

In many cases, the limitations sanctioned by treaty and adopted in national law excuse uses that would have been licensed by the parties, but for insurmountable transaction costs. The statutory licenses that exist in many countries to permit photocopying of scientific articles or parts of books, for scholarly or business-related purposes, are good examples of limitations based on such market failure.[2] These statutory schemes will normally provide for equitable remuneration to collecting societies acting on behalf of authors and publishers.

The Berne Convention recognizes two types of limitations: uncompensated limitations and compensated limitations (or statutory licenses). Uncompensated limitations sometimes mirror uses or practices that are not considered part of the legitimate scope of the author's proprietary grant and other times accommodate uses that, though they properly belong to the author, will not be licensed by him because of the problem of transaction costs. Uncompensated limitations permitted by the Berne Convention

1. Rome Convention Art. 15(2). Note however that Art. 15(2) last sentence does not allow compulsory licenses unless these are compatible with the Rome Convention.
2. *See* §§ 11.2.1 and 11.2.2, below.

include press dissemination of public speeches (Article 2*bis*(2)), quotations (Article 10(1)), uses for teaching purposes (Article 10(2)), press usage (Article 10*bis*(1)), reporting of current events (Article 10*bis*(2)), and ephemeral recordings by broadcasting organizations (Article 11*bis*(3)).[3] Many of these provisions simply state the purpose of the permitted use and leave a measure of freedom to contracting states for implementation at the national level. In some cases (e.g., Articles 10(1) and 10(2)), the norms of the Berne Convention refer to "fair practice," a notion that leaves room for interpretation taking account of local conditions,[4] thus creating additional flexibilities for contracting states.

Further, as the record of the Stockholm Conference reveals, certain exceptions to particular rights, although not expressed in the international instruments, may nevertheless be implied.[5] These so-called *minor reservations* (or "minor exceptions") fall into two categories: i) those in relation to performing, recitation, broadcasting, recording, and cinematographic rights, and ii) those in relation to translations. As their name "minor reservations" indicates, these implied limitations usually concern *de minimis* uses, such as use of works during religious ceremonies, or by military bands. During the Brussels and Stockholm Conferences on the Revision of the Berne Convention, the delegations invoked the "minor reservations" doctrine to justify the maintenance in their national laws of existing exceptions of minor importance.[6]

Compensated limitations (statutory licenses) expressly allowed under Berne concern rebroadcasting and cable retransmission (Article 11*bis*(2)) and mechanical recording of musical works (Article 13). Also, for developing nations, there is the Berne Appendix, which provides for a complicated scheme of compulsory licensing, allowing translation and reproduction of printed works under strict conditions.[7]

Compensated limitations or statutory licenses occupy a position on the continuum of copyright and author's right somewhere between exclusive rights and absolute exemptions. In strictly economic terms, these arrangements reflect the legislator's judgment that to extend an exclusive right would hamper socially important uses, typically because of the high transaction cost of negotiating a license, but that to make the use entirely free would seriously impair needed rewards for the author. Institutional and technological innovations such as collecting societies and electronic contracting will sometimes obviate statutory licenses. For example, the United Kingdom's 1988 Copyright, Designs and Patents Act encourages collective licensing in situations where

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3. *See* Ricketson 2003.
4. *Id.*, at 13.
5. *Id.*, at 33; *see also* Report of the Panel, United States—Section 110(5) Copyright Act, 15 June 2000, WTO Doc. WT/DS/160/R, §6.33 et seq. [hereinafter U.S.—Section 110(5) Report].
6. Senftleben 2004, 198–201.
7. *See* §11.5, below.

compulsory licenses represent only a second-best solution. To stimulate the formation of the necessary collecting agencies, the Act expressly exempts specified classes of use unless certified licensing arrangements come into place to administer the uses.[8]

The TRIPs Agreement incorporates the Berne Convention's minimum substantive standards for limitations as a single, loosely circumscribed norm in Article 13's "three-step test," which is discussed below.[9] Article 7 of the Agreement gives content to the norm by admonishing WTO States that "[t]he protection and enforcement of intellectual property rights should contribute to . . . a balance of rights and obligations."[10] The preamble to the WIPO Copyright Treaty similarly underscores the need to "maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention."[11]

The fair use doctrine in the United States, a statutory codification of one hundred years of judicial decisions, supplements more particularized statutory exemptions by excusing certain uses in cases where the social value of the use exceeds its private cost and, typically, transaction costs make it impractical for the copyright owner to license the use.[12] Section 107 of the 1976 Act provides that uses for such purposes as criticism, comment, news reporting, teaching, scholarship, and research are fair and noninfringing depending on a calculus of four factors: the purpose and character of the use; the nature of the copyrighted work; the amount appropriated from the copyrighted work; and "the effect of the use upon the potential market for or value of the copyrighted work." In other common law countries, the considerably narrower fair dealing defense for research or private study,[13] and criticism, review, and news reporting[14] encompasses some of the specific objects of American fair use doctrine but does not give courts the same open-ended authority to resolve cases outside these specific categories. Nonetheless judicial opinions

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8. *See*, *e.g.*, United Kingdom, Copyright, Designs and Patents Act 1988 §§35 (educational recording of broadcasts and cable programs), 60 (copying of scientific or technical abstracts), 74 (copying for handicapped). *See generally* Cornish 1996, 380–81.

   The difference between the two categories of limitations is important especially in relation to the three-step test discussed below. The existence of a statutory compensation scheme may avoid causing "unreasonable prejudice" to authors or right holders and thereby makes it easier for limitations of the latter category to satisfy the third step of the test. *See* §11.1, below.
9. *See* §11.1, below.
10. TRIPs Agreement Art. 7.
11. WIPO Copyright Treaty Preamble.
12. *See* §11.2, below. *See generally* Goldstein 2005, chap. 12.
13. *See*, *e.g.*, United Kingdom, Copyright, Designs and Patents Act 1988 §29.
14. *See*, *e.g.*, United Kingdom, Copyright, Designs and Patents Act 1988 §30.

in common law countries occasionally suggest a generalized "public interest" defense comparable in some respects to fair use.[15]

There is no specific provision for fair dealing in civil law practice, but copyright legislation in most civil law countries contains exemptions comparable to those provided under the fair dealing defense. The French legislation, for example, provides narrow exemptions in the case of published works for private copies and, so long as the source and author's name are clearly stated, for press reviews and analyses and short quotations for critical, educational, polemic, or scientific purpose.[16] The German Copyright Act provides a long list of limited exceptions to copyright in addition to those for quotation and private use.[17]

In the European Union, the E.C. Copyright in the Information Society Directive of 2001 has levelled some of the uneven terrain of copyright limitations.[18] Article 5 of the Directive enumerates exhaustively the types of limitations that member states may implement in national law. The list contains a single mandatory limitation permitting transient copying incidental to digital communications, including caching and browsing,[19] and a menu of 21 optional limitations, from which member states may select.[20] The limitations officially authorized by the European legislature concern not only such generally accepted uses as reprography (i.e., photocopying), private copying, archival and ephemeral copying, educational uses, news reporting, quotation, and parody, but also more esoteric uses, such as use in religious celebrations, "use in connection with the demonstration or repair of equipment," etc. Finally, the Directive also allows minor "analogue" exemptions (i.e., those dating from predigital times) to survive. All limitations implemented at the national level must comply with the "three-step test."[21]

The societal goals served by limitations on copyright differ from one country to another as nations assign different values to freedom of expression and information, research and education, access to libraries and archives, assisting the disabled, and promoting competition. The economic rationale for these limitations will also change over time as new information technologies reduce or increase the transaction costs that so often justify at least some of

15. *See* Skone James et al. 1991, §11-30. *But see* Laddie et al. 1995, §§2.150–2.153.
16. France, Intellectual Property Code Art. L. 122-5.
17. Germany, Copyright Act Section VI.
18. *See generally* L. Guibault et al., *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, Report to the European Commission (2007). For national implementations see Part II: G. Westkamp, The Implementation of Directive 2001/29/EC in the Member States (2007).
19. E.C. Copyright in the Information Society Directive Art. 5(1). *See* §11.3.2, below.
20. E.C. Copyright in the Information Society Directive Art. 5(2) and (3).
21. E.C. Copyright in the Information Society Directive Art. 5(5).

these limitations. In a word, change is a motif that dominates this corner of copyright more than any other.[22]

§11.1 The Three-Step Test

The Berne Convention, Paris Act itemizes the specific uses that are acceptable as exemptions to the minimum rights guaranteed and also, in Article 9(2), imposes a more generalized limitation on exemptions from the reproduction right. Article 9(2), added in Stockholm in 1976, provides: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such [protected literary and artistic] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." According to the WIPO *Guide to the Berne Convention*, the permitted exceptions encompass the privilege to use the work in its translated, as well as its original form, subject in all cases to respect for moral right.[23]

Article 13 of the TRIPs Agreement applies Berne Article 9(2)'s three-step formula for exceptions to the reproduction right to all exclusive rights in literary and artistic works, not just the reproduction right.[24] The provision does not prescribe a template for any preferred system of national limitations and exceptions and most likely permits both discrete civil law-style exceptions as well as broadly phrased fair use-style exemptions.

Article 10 of the WIPO Copyright Treaty and Article 16 of the WIPO Performances and Phonograms Treaty similarly apply the Berne formula to the minimum rights established by their texts. Although the TRIPs and WIPO Treaty counterparts to Article 9(2) apply to all the rights encompassed by their respective texts, they do not provide a general charter for imposing such limitations on rights other than the reproduction right. Because Article 20 of the Berne Paris Act reserves the right of Union countries to enter into special agreements among themselves, only "in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention," neither TRIPs nor the WIPO Treaties can be used by a Berne Union member to justify derogation of any minimum right established by Berne. However, new minimum treaty

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22. P. Bernt Hugenholtz, *Fierce Creatures. Copyright Exemptions: Towards Extinction?*, *in* Intellectual Property Rights: Critical Concepts in Law, Vol. 2, 231 (David Vaver ed., Routledge 2006).
23. WIPO 1978, 53.
24. TRIPs Agreement Article 13 provides that "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

rights not guaranteed by Berne, such as the rental right, may be subjected to these more extensive limitations.

In 2000, a World Trade Organization Panel interpreted TRIPs Article 13 in a case against the United States brought before the WTO by the European Union.[25] The Panel ruled that the so-called "business exemption" (Section 110(5) of the U.S. Copyright Act),[26] which allows broadcast music to be publicly played in bars, restaurants, and stores, under well-defined conditions, violated the minimum standards of copyright protection set out in the TRIPs Agreement. The Panel noted at the outset "that [TRIPs] Article 13 cannot have more than a narrow or limited operation. Its tenor, consistent as it is with the provisions of Article 9(2) of the Berne Convention (1971), discloses that it was not intended to provide for exceptions or limitations except for those of a limited nature."[27]

The Panel then interpreted each of the three steps of Article 13. The word "certain" in the *first step* implies, according to the Panel, that, as a matter of legal certainty, a limitation must be well defined. However, "there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty."[28] "Special," according to the Panel, means something akin to exceptional. "In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense."[29] However, "special" does not imply that policy objectives pursued by the limitation or exception at issue need to be objectively justified. According to the Panel, "a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. The wording of Article 13's first condition does not imply passing a judgment on the legitimacy of the exceptions in dispute."[30]

The Panel's reading of the *second step*—no conflict with normal exploitation of a work—is essentially economic. "We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e., the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright), if uses, that in principle are covered by that right but exempted under

25. *See* U.S.—Section 110(5) Report.
26. *See* §11.3.3, below.
27. *See* U.S.—Section 110(5) Report, §6.97.
28. U.S.—Section 110(5) Report, §6.108. This language arguably permits the survival of the American fair use rule. Several scholars have questioned whether the fair use doctrine complies with (the first part of) the three-step test. *See* Ricketson 2003, 68–69.; Senftleben 2004, 162.
29. U.S.—Section 110(5) Report, §6.109.
30. U.S.—Section 110(5) Report, §6.112.

the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains."[31]

As to the *third step*, the Panel opined: "[A] certain amount of 'prejudice' has to be presumed justified as 'not unreasonable.' In our view, prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner."[32] The words "legitimate" and "reasonable" in the third step presumably inject normative meaning into the three-step test and, arguably, admit a variety of public interests into the three-step equation.[33]

The 1967 Stockholm Conference established a principle that the payment of equitable remuneration could be taken into account in the context of the third criterion.[34] Thus the third step allows payment of equitable remuneration under statutory licenses to overcome an otherwise unreasonable injury to the author's legitimate interests.[35] For example, while Article 9(2) allows countries to excuse entirely the making of small numbers of private copies, it will also tolerate more widespread, systematic copying so long as equitable remuneration is paid to the copyright owner and the use does not interfere with the work's normal exploitation. The Report of Main Committee I of the 1967 Stockholm Conference referred to photocopying for various purposes to demonstrate the relationship between Article 9(2)'s second and third steps: "If it [the photocopying] consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, providing that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use."[36]

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31. U.S.—Section 110(5) Report, §6.183.
32. U.S.—Section 110(5) Report, §6.229.
33. *See Declaration: A Balanced Interpretation of the "Three-Step Test" in Copyright Law*, 39 I.I.C 707 (2008). *See, e.g.*, Switzerland, "Electronic Press Review," Supreme Court, June 26, 2007, 39 I.I.C. 990 (2008) (electronic press clipping permitted subject to remuneration, no conflict with three-step test; public interest analysis as part of 3rd step).
34. Senftleben 2004, 237. *See* Germany, "Sending of copies," Federal Supreme Court, February 25, 1999, Case I ZR 118/96, [1999] GRUR 1999, 707 (document delivery on demand of library patrons permitted, but equitable remuneration required to satisfy three-step test); and Germany, *Elektronischer Pressespiegel*, Federal Supreme Court, July 11, 2002, Case I ZR 255/00, [2002] GRUR 2002 963 (exception in German Copyright Act allowing electronic press clippings subject to equitable remuneration deemed compliant with three-step test).
35. *See*, *e.g.*, Ricketson 1987, 483–486; WIPO 1978, 55–56.
36. Reports of the Five Main Committees of the Intellectual Property Conference of Stockholm 7, 26–27 (1967).

The three-step test has found its way, through Article 10 of the WIPO Copyright Treaty, into Article 5(5) of the 2001 E.C. Copyright in the Information Society Directive.[37] After its incorporation into the Directive, and despite scholarly opinion that the test is a norm addressed to national legislatures[38] and not the citizens of the member states, several member states, including France, have transposed the norm expressly into their national laws. In these countries the three-step test now constitutes a directly applicable rule of substantive law with respect to the interpretation of limitations.[39] By contrast, other member states, such as Germany, the Netherlands, and the United Kingdom, have adhered to the test's original function as a norm addressed to the conduct of national legislatures, not individual nationals. China has incorporated the three-step test into its copyright law of 2002,[40] and in 2006, following the U.S.-Australia Free Trade Agreement, the Australian legislature did the same.[41]

§11.2 Private Uses

Exemptions permitting private copying and other private uses of copyrighted works probably constitute the most far-reaching limitations on the author's economic rights. They are certainly the most controversial, particularly in a digital environment that contemplates "pay-per-use" business models at least in theory, and facilitates massive unauthorized "file sharing" in practice. The Berne Convention does not expressly permit private copying, but it is clear from the historical record that Article 9(2) of the Berne Paris Text provides a sufficient conventional starting point for testing these limitations, many of which have been imposed to remedy the problem of transaction costs. At the national level, private use limitations come in many forms, serving a variety

37. Copyright in the Information Society Directive Art. 5(5) ("The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.").
38. See Ch. Geiger, From Berne to National Law, via the Copyright Directive: the Dangerous Mutations of the Three-step Test, [2007] E.I.P.R. 486.
39. *See e.g.*, France, Mulholland Drive, Court of Cassation, February 28, 2006, 209 R.I.D.A. 322 (2006), *discussed in* Benabou 2008, 216–226. *See also* Mulholland Drive, Court of Cassation, June 19, 2008, 217 R.I.D.A. 298 (2008) (private copying exemption is a defense, not a right that can support a main action).
40. China, Copyright Act, Art. 21. *See* G. Shoukang, *New Chinese Copyright Act*, [2000] 31 I.I.C. 526–530.
41. Section 200 AB, Australia Copyright Act, as amended by the Copyright Amendment Act 2006, Act. No. 158, 2006.

of functions: to facilitate research and scholarship,[42] to compensate authors for mass-scale private copying,[43] or to promote interoperability of computer programs.[44]

§11.2.1 Research and Scholarship

Legislation in most countries expressly exempts from copyright liability small numbers of copies made for purposes of research. The U.K. Act excuses "[f]air dealing with a literary, dramatic, musical or artistic work for the purposes of research or private study."[45] The Japanese Act makes copying within a family or similarly limited circle permissible, so long as it does not employ publicly available automatic copiers.[46] Article 53 of the German Act exempts single copies for a variety of private or personal uses, distinguishing between "scientific use" and "other private use"; the Act is more generous to the former.[47] In addition, the Act exempts on-demand delivery of copies qualified under Article 53, subject to payment of equitable remuneration.[48]

The Italian legislation allows copying for a reader's personal use "when made by hand or by a means of reproduction unsuitable for circulating or diffusing the work in public."[49]

The E.C. Copyright in the Information Society Directive allows, but does not mandate, private use exemptions under strict conditions,[50] one of which is that the reproduction be made "for ends that are neither directly nor indirectly commercial." This requirement effectively excludes private copying in the context of commercial research.

In *CCH Canadian Ltd. v. Law Society of Upper Canada*,[51] the Canadian Supreme Court gave a particularly broad reading to that country's research and private study exception,[52] holding that it was fair dealing for a library to photocopy extracts from copyrighted legal publications in its collection for delivery to legal researchers. "Research," the Court said, "must be given a large and liberal interpretation in order to ensure that users' rights are not

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42. *See* §11.2.1, below.
43. *See* §11.2.2, below.
44. *See* §11.2.3, below.
45. United Kingdom, Copyright, Designs and Patents Act 1988 §29(1).
46. Japan, Copyright Act Art. 30.
47. Germany, Copyright Act Art. 53.
48. Germany, Copyright Act Art. 53(a).
49. Italy, Copyright Act Art. 68(1). *See also* Art. 71 *sexies*, which deals with private copying of phonograms and video.
50. E.C. Copyright in the Information Society Directive Art. 5(2)(b). *See* §11.2.2, below.
51. 2004 SCC 13, 326 D.L.R. (4th) 395.
52. Canada, Copyright Act §29 ("Fair dealing for the purpose of research or private study does not infringe copyright.").

unduly constrained"; research "is not limited to non-commercial or private contexts."[53] The court also interpreted the second element of the exception, "fairness," to mirror the factors applied by American courts under that country's fair use doctrine: purpose of the dealing ("research done for commercial purposes may not be as fair as research done for charitable purposes"[54]); character of the dealing (a single copy is fairer than multiple copies); amount of dealing (less is fairer than more); alternatives ("If there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be considered by the court."[55]); the nature of the work (confidential works get greater protection than others); and effect of the dealing on the work (market harm[56]).

U.S. copyright law provides no categorical exemption for copies made for purposes of scholarship. The principal source of such a privilege lies in the fair use doctrine. "Scholarship" is one of the six exemplary purposes cited by the 1976 Copyright Act[57] as worthy of fair use. Private scholarly use also figures prominently among the examples given in the Act's legislative history of uses that would presumably qualify as fair under the statute: "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported."[58]

Most modest research uses of copyrighted materials are assimilated into the exemption for private scholarship.

Legislatures and courts sometimes excuse research uses on the ground that they do not impair the customary markets for a copyrighted work. In one leading American case,[59] the court held that it was fair use for the defendant to photocopy articles from plaintiff's medical journals for distribution to

53. CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13 [2004], 1 S.C.R. 339 §51.
54. *Ibid.*, §54.
55. *Ibid.*, §57.
56. *Ibid.*, §§58, 59.
57. The other purposes cited are "criticism, comment, news reporting, teaching (including multiple copies for classroom use)… or research." U.S. 1976 Copyright Act §107.
58. U.S. House Report, 65.
59. Williams & Wilkins Co. v. United States, 487 F.2d 1345 (1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975).

medical researchers because the copyright owner had not shown that it was, or would be, substantially harmed by the practice.[60] Where, however, technical or institutional measures, such as collecting societies, have reduced the transaction costs of obtaining photocopying permission, liability may be imposed. In a subsequent American photocopying decision holding that it was not fair use for defendant to reproduce single copies from plaintiffs' journals for research purposes, the court gave substantial weight to the effect of the licensing activities of a reproduction rights organization in reducing transactions costs.[61]

§11.2.2 Private Copying and Home Taping

Well into the twentieth century, private copying rarely entailed more than hand copying by a researcher of a passage from a text or copying by a teacher of materials into a lesson book—activities that easily came within the exceptions to the reproduction right permitted by Article 9(2) of the Berne Convention.[62] But by the latter part of the century, with the massive proliferation of photocopies, audiotapes, and videotapes, nominally private activities began seriously to undermine the economic interests of copyright owners. Some national legislatures responded with equitable remuneration schemes on the premise that, though the new copying technologies did not conflict with the normal exploitation of copyrighted works, they did unreasonably prejudice the legitimate interests of authors, a condition that Article 9(2) allows equitable remuneration to cure.

The German legislation establishes a remuneration system for photocopies, imposing a levy both on manufacturers of photocopying equipment and on those who operate the equipment—educational and research institutions including schools, universities, and vocational training institutions and public libraries, as well as copy shops.[63] In France, the Intellectual Property Code contemplates photocopying licenses administered by one or more reprographic collecting societies.[64] The British Copyright, Designs and Patents Act strikes a balance between private initiative and government regulation in establishing the terms for educational photocopying by prescribing limited exemptions in default of negotiated licenses; subjecting licenses to review by the Copyright Tribunal; implying an indemnity under which the grantor of a blanket license effectively warrants that the license encompasses all works

60. 487 F.2d 1345, 1359.
61. American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994).
62. *See* §11.1, above.
63. Germany, Copyright Act Art. 54(2). For a discussion of the provision's application, see Adolf Dietz, *News from Germany*, 176 R.I.D.A. 166, 194–200 (1998).
64. France, Intellectual Property Code Arts. L. 121-10 through L. 121-12.

within the class covered and not just those over which the licensor actually possesses legal authority; and authorizing the Secretary of State to expand the license to encompass similar works.[65]

The E.C. Copyright in the Information Society Directive allows member states to maintain or introduce private copying exemptions under two regimes: a broadly worded reprography exemption, which is limited to (photo)copying on paper or similar media,[66] and a more restrictive private copying exemption[67] that applies "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation."[68]

In most European countries compensation for private copying of recorded music and films (formerly known as "home taping") takes the form of a levy on blank media, reproduction and recording equipment, or both. For example, the German and Spanish legislation imposes a levy on both equipment and blank media,[69] while the French legislation imposes the levy on blank media only.[70] According to one survey of home taping legislation, "all sorts of solutions are to be found, ranging from a pure tax without any participation on the part of copyright owners to pure copyright royalties."[71] The German statute treats these levies strictly as a royalty payable to authors in compensation for a use under author's right; under the national treatment principle, the levies are paid to qualifying foreign, as well as domestic, authors. Other national schemes divide revenues in varying proportions between payments to national and foreign authors and social and cultural funds dedicated entirely to domestic uses.[72]

With the proliferation of high-grade digital reproduction and recording technology in private homes, levies have become increasingly widespread. Legislation today imposes equipment levies not only on now-antiquated

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65. United Kingdom, Copyright, Designs and Patents Act 1988 §§36, 136–137; 140–141. *See generally* Cornish 1996, 437.
66. E.C. Copyright in the Information Society Directive, Art. 5(2)(a). *See* Lucie Guibault, The reprography levies across the European Union (2003).
67. E.C. Copyright in the Information Society Directive, Art. 5(2)(b).
68. E.C. Copyright in the Information Society Directive, Art. 5(2)(b). Note that "fair compensation" is not the same as "equitable remuneration" in other directives. The new concept of "fair compensation" is a compromise term trying to accommodate member states with levy schemes providing for "equitable remuneration," and those (such as the United Kingdom and Ireland) that have so far resisted levies altogether. Recital 35 gives some guidance in interpreting this notion.
69. Germany Copyright Act Art. 54; Spain, Copyright Act Art. 25.
70. France, Intellectual Property Code Art. L. 311-4.
71. Dillenz 1990, 192.
72. *See* Dillenz 1990, 187.

devices, such as tape and video recorders, but also on fax machines,[73] scanners,[74] DVD recorders, and in some countries even on mobile telephones and personal computers.[75] Blank media levies have shifted from blank tapes to blank CDs and DVDs, to flash media and hard disks. The ongoing expansion of levy schemes raises several questions: Should multipurpose devices, such as personal computers, be subjected to copyright levies, since many users of this equipment will not engage in unauthorized digital copying? Should levies compensate not only for permitted uses, such as private copying, but also for unlawful uses, such as file sharing over peer-to-peer networks?[76] Should levies, and corresponding private copying exemptions, survive in a digital environment that allows right holders technical control over private uses?[77] Article 5(2)(b) of the E.C. Copyright in the Information Society Directive answers at least the last question by directing member states that provide for private copying schemes to take into account "the application or non-application of technological measures" when calculating the amount of "fair compensation" for acts of digital private copying.

Regulation of private recording in the United States focuses on digital reproduction and combines technical measures, levies on recording devices and media, and outright exemption. The Audio Home Recording Act of 1992[78] prohibits the manufacture, importation, or distribution of digital recording devices that are not equipped with a "Serial Copy Management System" that disables the device from copying a copy of a digital audio recording. The Act also imposes a levy on digital audio recording devices and digital recording media, with the royalties to be collected by the Copyright Office and distributed by a Copyright Arbitration Royalty Panel, and it immunizes "noncommercial" taping of copyrighted works from suits for copyright infringement, whether the technology employed is digital or analog. This American levy scheme however has limited practical meaning, since the

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73. *See, e.g.*, Germany, "Fax machines" Federal Supreme Court, January 28, 1999, Case I ZR 208/96.
74. *See, e.g.*, Germany, "Scanner" Federal Supreme Court, July 5, 2001, Case I ZR 335/98, 33 I.I.C. 773 (2002).
75. Note that rules on equipment and media levies vary considerably per Member State of the E.U.; *see* Guibault et al. 2003.
76. Note that most civil law countries will allow unauthorized downloading even from illegal sources. A notable exception is the German Act that excludes from its private copying exemption copies made from sources that are obviously illegally produced or made available to the public; Germany, Copyright Act Art. 53(1). *See also* France, Court of Cassation, May 30, 2006, 210 R.I.D.A. 326 (2006) (suggesting that private copying exemption applies only if a copy's source is lawful).
77. *See* Guibault et al. 2003
78. Pub. L. No. 102-563, 106 Stat. 4237 (1992). The Act appears as Chapter 10 of 17 United States Code.

digital audio recording devices (so-called DAT recorders) that the Act contemplates are now all but extinct.

§11.2.3 Reverse Engineering

One research use that is treated separately from scholarship is reverse engineering, the reproduction of a copyrighted computer program as an intermediate step in discovering the program's unprotected interface specifications in order to achieve interoperability with other programs or computers. Copyright owners typically disseminate their programs in the form of unreadable object code rather than readable source code, so that, to discern a program's unprotected elements, a competitor must analyze the object code version of the program either by various tests called "black box analysis" or, in some circumstances, by "disassembling" or "decompiling" the object code into human-readable form. This process invariably requires the competitor to copy the copyrighted program—either by loading, running, and storing the program in the course of black box analysis, or by converting object code into human-readable form through decompilation.

Articles 5(3) and 6 of the E.C. Software Directive respectively carve out exemptions for black box analysis and decompilation.[79] Article 5(3) defines the ideas susceptible to free use broadly, as it does the research processes aimed at discovering them. The provision entitles a person who has the right to use a copy of a computer program to observe, study, or test the functioning of the program in order to determine the ideas and principles that underlie any element of the program, if he does so "while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do."

In contrast to Article 5(3), Article 6(1)'s decompilation exception defines the compass of freely discoverable ideas more narrowly but extensively privileges the conduct, including reproduction and decompilation, aimed at discovering them. Where Article 5(3) excuses observation, study, or testing to determine the ideas and principles that underlie "any element of the program," Article 6(1) excuses the discovery only of "parts of the original

79. Software vendors will sometimes attempt to curtail reverse engineering through license prohibitions. While Article 8 of the Software Directive provides that the Directive "shall be without prejudice to any other legal provisions" of member states, such as patent, unfair competition, trade secret, and contract law, Article 8 specifically excepts from this general immunity, and makes "null and void," any "contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5(2) and (3)"—the provisions representing decompilation, back-up copies, and black box analysis.

On the E.C. Software Directive generally, see Lehmann & Tapper 1995; Czarnota & Hart 1991.

program which are necessary in order to achieve interoperability." But, as a counterweight, Article 6 privileges the competitor's reproduction of code, "and translation of its form," when "indispensable to obtain the information necessary to achieve interoperability of an independently created computer program with other programs." Article 6 adds the *caveat* that information obtained under the first paragraph shall not be used for developing, producing, or marketing "a computer program substantially similar in its expression, or for any other act which infringes copyright." Further, Article 6 privileges decompilation to produce "competing" as well as "attaching" computer programs.[80]

Unlike the European legislation, the U.S. Copyright Act contains no express exemption for reverse engineering but provides the basis for excusing the research activity in its fair use provision. American courts have excused copying for purposes of uncovering unprotected interface specifications, under the same general conditions as the E.C. Software Directive. In the first authoritative decision on the question, the Ninth Circuit Court of Appeals ruled in favor of a defendant that had copied and then disassembled the object code version of plaintiff's videogame in order to determine the functional specifications that would enable its own games to operate on plaintiff's console. The court ruled that "where disassembly is the only way to gain access to the ideas and functional elements embodied in a copyrighted computer program and where there is a legitimate reason for seeking such access, disassembly is a fair use of the copyrighted work as a matter of law."[81]

§11.3 Incidental Uses

National legislation will sometimes create exemptions for uses that are so closely allied, and incidental, to primary uses that themselves come within copyright control that the copyright owner will be legally presumed to have included the incidental use in any license to make the primary use.

§11.3.1 Ephemeral Copies for Broadcasting Purposes

Article 11*bis*(3) of the Berne Paris Text contemplates one such situation in allowing member countries to determine whether and under what conditions the right to broadcast a program includes the right to make a temporary

80. *See* E.C. Commission, *Twentieth Report on Competition Policy*, CM 60 91 410 Part II, ch. I 4(g) at 67 (Brussels, 1991).

81. Sega Enterprises, Ltd. v. Accolade, Inc., 977 F.2d 1510, 1527–28 (9th Cir. 1992).

("ephemeral") copy for purposes of broadcasting the program, and to authorize the preservation of recordings of "exceptional documentary character" in official archives. The E.C. Copyright in the Information Society Directive expressly permits ephemeral recording exemptions, using similar language.[82]

The U.S. Copyright Act permits a transmitting organization that is entitled to publicly transmit a performance or display of a work to make one copy or phonorecord of the transmission program that embodies the performance or display. The performance or display cannot, however, be of a motion picture or other audiovisual work. Further, the provision requires as a condition to the exemption that "(1) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and (2) the copy or phonorecord is used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security; and, (3) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public."[83]

§11.3.2 Transient Digital Copies

The reproduction of a computer program in the course of operating a computer may be excluded from copyright control if it is a necessary incidental use. Without such an exemption, a computer user would risk being a copyright infringer each time he started up his machine by reproducing his copy of an application program in the computer's random access memory, and each time he made a backup copy of the application program as a precaution against destruction of the original through electronic failure or operator error.

Article 5(1) of the E.C. Software Directive exempts unauthorized copies and adaptations from Article 4(1)'s reproduction and adaptation rights if "they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction." Article 5(2) provides that "[t]he making of a back-up copy by a person having a right to use a computer program may not be prevented by contract insofar as it is necessary for that use."

The U.S. Copyright Act provides that it is not copyright infringement for the owner of a copy of a copyrighted computer program to make, or to authorize the making of, another copy of the program, if the copy is created as an "essential step in the utilization of the computer program" in connection with

82. E.C. Copyright in the Information Society Directive Art. 5(2)(d).
83. U.S. 1976 Copyright Act §112(a).

the computer, and "in no other manner,"[84] or if the copy is "for archival purposes only and . . . all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful."[85] The provision carves out a parallel exemption from the derivative right to enable necessary adaptations of computer programs, and it modifies the distribution right as applied to computer programs put to these uses.

Courts have generally construed the "essential step" language narrowly, confining the exemption to the process of copying a computer program into the computer's random access memory each time the program is used, and erasing the program each time the computer is turned off.[86] Similarly, courts have construed the archival copy exemption narrowly and in light of the concern that occasioned its adoption: to guard against destruction or damage by mechanical or electrical failure.[87] The provision requires that, to be exempted from infringement, the otherwise infringing copy must be made or authorized by "the owner of a copy of the computer program."

The exemptions for copies made as an essential step in the use of a computer program or for archival purposes have in the United States been held not to encompass the transitory reproduction of computer programs in the course third-party computer maintenance.[88] However, an amendment to the 1976 Copyright Act in 1998 has exempted copies made of an authorized copy of the computer program in the course of running a computer "for purposes only of maintenance or repair of that machine." The new copy cannot be used in any other manner and must be destroyed "immediately after the maintenance or repair is completed."[89]

Outside the context of computer programs, the ever-increasing digitization of media, equipment, and networks has placed the issue of transient copying at the center of recent copyright debates.[90] Although the WIPO Copyright Treaty fails to deal with this highly volatile issue, the E.C. Copyright in the Information Society Directive offers a compromise solution. On the one hand, Article 2 of the Directive prescribes a broadly phrased reproduction right that includes "temporary or permanent reproduction by any means and in any form, in whole or in part."[91] On the other hand, Article 5(1) of the Directive instructs member states to except or carve out certain transient

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84. U.S. 1976 Copyright Act §117(a)(1).
85. U.S. 1976 Copyright Act §117(a)(2).
86. *See, e.g.*, Sega Enterprises Ltd. v. Accolade, Inc. 977 F.2d 1510, 1520 (9th Cir. 1992).
87. *See, e.g.*, Atari, Inc. v. JS&A Group, Inc., 597 F.Supp. 5 (N.D.Ill. 1983).
88. MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994).
89. U.S. 1976 Copyright Act §117(c).
90. *See*, e.g., P. Bernt Hugenholtz, *Caching and Copyright. The Right of Temporary Copying*, [2000] E.I.P.R. 482.
91. E.C. Copyright in the Information Society Directive Art. 2.

copies from the reproduction right: "Temporary acts of reproduction referred to in Article 2, which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2."[92]

Article 5(1) largely responds to concerns in the telecommunications sector that Article 2's broad reproduction right would no longer allow such routine acts as "proxy caching" and "system caching." Consumer groups, libraries, and free speech advocates also expressed concerns that "browsing" would no longer be allowed without permission. Although the wording of Article 5(1) is not free from ambiguities, it appears that such acts are indeed exempted, as is suggested by Recital 33 to the Directive:

"under these conditions [stated in Article 5(1)] this exception covers also acts of caching or browsing."

The European Court of Justice has interpreted Article 5(1)'s exemption narrowly to apply only to automated processes that require no human intervention. "[T]he Court finds that an act can be held to be 'transient' within the meaning of the second condition laid down in Article 5(1) of Directive 2001/29 only if its duration is limited to what is necessary for the proper completion of the technological process in question, it being understood that that process must be automated so that it deletes that act automatically, without human intervention, once its function of enabling the completion of such a process has come to an end."[93]

§11.3.3 Other Incidental Uses

The robust and efficient operation of the musical performance right societies explains why exemptions and compulsory licenses have generally not been needed to accommodate the performance right to market realities.[94]

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92. E.C. Copyright in the Information Society Directive Art. 5(1).
93. Infopaq International A/S v. Danske Dagblades Forening, European Court of Justice, July 16, 2009, Case C-5/08 (automated data capture of 11 words taken from scanned newspaper articles deemed act of reproduction if extracted words express intellectual creation; transient copying exemption not applicable because not all temporary copies are automatically deleted). *See also* Belgium, Copiepresse v. Google, Court of Brussels, February 13, 2007, 39 I.I.C. 491 (2008) (Google cache deemed reproduction not exempted by transient copying exemption).
94. In some respects the operations of music collecting societies, albeit under the shelter of the exclusive performance right, approximate schemes of equitable remuneration in those situations where their proposed rates to users are subject to administrative or judicial review. On the operation of copyright collecting societies, see §7.6.3, above.

Performance of a work in a public place such as a restaurant or bar will generally come within copyright control even though the place is frequented for purposes other than viewing or hearing the work performed. Typically, the works in issue are musical, and in many cases a blanket license from the musical performing rights society will cover the performance. In some places, however, such incidental uses will be subject to equitable remuneration.

The U.S. Copyright Act carves out an exemption for public performance or display in certain situations where equipment, such as a television or radio receiver carrying a broadcast performance or display, is turned on in a public place. As originally enacted, section 110(5)'s "homestyle" exemption pivoted on three conditions: reception of the transmission embodying the performance or display had to be on a single receiving apparatus of a kind commonly used in private homes; no direct charge could be made to see or hear the transmission; and the transmission thus received could not be further transmitted to the public.[95] The provision was amended in 1998 to make the nature and size of the establishment in which the transmission is received the basis for a "business" exemption.[96] In 2000, a WTO TRIPs Panel ruled that the business exemption, which encompassed transmissions to a substantial majority of all eating and drinking establishments in the U.S., violated TRIPs Article 13 and Articles 11(1)(ii) and 11*bis*(1)(iii) of the Berne Convention Paris Act, as incorporated into the obligations imposed by the TRIPs Agreement.[97]

Among the twenty-odd optional exemptions listed in the E.C. Copyright in the Information Society Directive, Article 5(3)(i) allows the "incidental inclusion of a work or other subject matter in other material."[98] Such an exemption would allow, for instance, the showing of copyrighted billboards in a televised street scene or the inclusion of inadvertent background music in a documentary. Incidental inclusion exemptions exist in various member states, such as Germany[99] and the United Kingdom.[100]

§11.4 Public Uses

In most cases, the Berne Convention bars member states from permitting widespread, as opposed to private, copying of protected works unless provision

95. U.S. 1976 Copyright Act §110(5)(A).
96. U.S. 1976 Copyright Act §110(5)(B).
97. *See* §11.1, above.
98. E.C. Copyright in the Information Society Directive Art. 5(3)(i). The Directive's menu of allowed exemptions also mentions several other incidental uses, such as "use in connection with the demonstration or repair of equipment" (Art. 5(3)(l)), and "use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building" (Art. 5(3)(m)).
99. Germany, Copyright Act Art. 57.
100. United Kingdom, Copyright, Designs and Patents Act 1988 §31.

is made for equitable remuneration and Article 9(2)'s other two requirements are met, or unless the exempted use comes under some other more specific provision of the treaty. This section discusses five categories of limitations allowing public uses that are commonly found in national laws: quotation and parody, uses by the media, educational uses, library or archival uses, and mechanical recordings of musical works.

§11.4.1 Quotation and Parody

Article 10(1) of the Berne Paris Text obligates member countries to permit "quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries."[101] The condition that the quoted work "has already been lawfully made available to the public" effectively secures the author's reputational interest in privacy as well as his economic interest in first publication. The requirement that the quotation be compatible with fair practice will probably turn in any case on whether the use interferes with the market for the original work.[102]

Significantly, Article 10(1) is phrased as a mandatory exception: "It shall be permissible to make quotations. . . ." While mandatory limitations are not uncommon in international instruments in the general realm of intellectual property, this is the only instance of a mandatory limitation in an international copyright treaty.[103]

Although Article 10(1) is mandatory rather than permissive, national legislatures are presumably free to prescribe the conditions on which quotation is permitted. The E.C. Copyright in the Information Society Directive allows quotations "for purposes such as criticism or review, provided that they relate to a work" under conditions similar to Article 10(1) of Berne.[104] The French Intellectual Property Code exempts the use of short quotations from published works where they are "justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated"; also, the name of the author and the source must be clearly stated.[105] The German Copyright Act provides for quotation from published works for purposes of

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101. Berne Convention, 1971 Paris Text Art. 10(1). Article 10(3) requires that, where a work is quoted from under Article 10(1), "mention shall be made of the source, and of the name of the author if it appears thereon."
102. WIPO 1978, 58–59.
103. Of course, the Berne Convention, TRIPs, and the WIPO Copyright Treaty do provide for certain mandatory *exclusions* of protected subject matter. *See* discussion §6.1.3, above.
104. E.C. Copyright in the Information Society Directive Art. 5(3)(d).
105. France, Intellectual Property Code Art. L. 122-5(3)(a).

illustration in "an independent scientific work," in "an independent work of language," and "in an independent musical work."[106] Common law countries characteristically subject these uses either to highly particularized conditions or to the more generalized requirements of fair dealing or fair use.[107]

Article 10(1) of the Berne Convention contains no express limitation on the size of the quotation permitted and, in the view of the WIPO *Guide to the Berne Convention*, "it is a question of proportion and there are cases where quite large extracts from articles or speeches fall to be quoted."[108] Legislation in several countries expressly permits the reproduction of art works in catalogues prepared for art sales or auctions.[109] Nonetheless, the French Supreme Court has ruled that the reproduction of an entire work of art in an auction catalogue without the artist's permission failed to qualify as a short quotation under the governing legislation and consequently was actionable.[110]

Parody, though nowhere expressly exonerated in the Berne text, is widely accepted across the Berne Union as a permitted use, presumably on the ground that it meets Article 9(2)'s standards. Professor Françon has observed that "the very principle of the theory of parody is that the parodist may indulge in his art without need to obtain authorization from the author of the parodied work. It was feared that, if such authorization had to be obtained, it would be refused by an all too conceited author. Consequently, it seems preferable to state that no authorization was necessary and that there is, in this respect, an exception to the author's monopoly to exploit the work."[111] This generalization should not, however, obscure two harder questions raised by parodies under national law: the point at which parody leaves off and a derivative work begins,[112] and the possible conflict between parody and moral right.[113]

Legislation in some countries specifically exempts parodies from copyright control. The E.C. Copyright in the Information Society Directive allows

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106. Germany, Copyright Act Art. 51.
107. *See* §11, above. *See generally*, Yves Gaubiac, *Freedom to Quote from an Intellectual Work*, 171 R.I.D.A. 2 (1997).
108. WIPO 1978, 59.
109. *See, e.g.*, United Kingdom, Copyright, Designs and Patents Act 1988 §63; Germany, Copyright Act Art. 58 (permitting use for purposes of public exhibition as well as auction); E.C. Copyright in the Information Society Directive Art. 5(3)(j).
110. Fabris v. Loudmer, Court of Cassation, (1st Civ. Chamber), January 22, 1991, 23 I.I.C. 294 (1992).
111. Françon 1988, 285.
112. *See* §6.1.2.6, above. *See, e.g.*, Netherlands, Uitgeverij Byblos BV v. J. K. Rowling, District Court of Amsterdam, April 3, 2003, [2004] ECDR 61 (children's book *Tanja Grotter and the Magic Double Bass* considered unauthorized derivative work, not parody of *Harry Potter and the Philosopher's Stone*); Germany, "Gies eagle," Federal Supreme Court, March 20, 2003, Case I ZR 117/00, 35 I.I.C. 984 (2004) (use of copyrighted sculpture considered parodic because of "anti-thematic treatment").
113. *See* §10.5.2, above.

exemptions in cases of "use for the purpose of caricature, parody or pastiche,"[114] echoing the French Intellectual Property Code that exempts "parody, pastiche and caricature, observing the rules of the genre," once a work has been published.[115] The Spanish Copyright Act provides that a "parody of a disclosed work shall not be considered such a transformation as requires the consent of the author, provided that it embodies no risk of confusion with that work and does no harm to the original work or its author."[116] The German Copyright Act does not expressly provide for parodies, but Article 24's doctrine of free use effectively gives authors breathing room to draw on themes and ideas in earlier works, subject to a bar against free use of musical elements in later works.

In common law countries such as the United Kingdom and Canada, parody may be assimilated to the fair dealing exemption for the purpose of criticism, so long as the parody meets the statutory requirement of sufficiently identifying the original work and its author. There is also some suggestion that English courts will apply a somewhat more generous infringement standard to parodies than they will to other works.[117] A fair dealing exception introduced into the Australian Copyright Act in 2006 carves out a privilege not only for parody, but for satire as well.[118]

In Campbell v. Acuff-Rose Music, Inc.,[119] the U.S. Supreme Court's first parody decision, the Court offered a nominally objective test for determining whether a work is in fact a parody—"whether a parodic character may reasonably be perceived"—and concluded that defendant's "rap" version of plaintiff's poignant lyric *Oh, Pretty Woman* could reasonably be perceived as a parody. The conclusion that a work is a parody does not, however, conclude the question of liability. Indeed, the Court in *Campbell* remanded the case to the lower court for determination of whether defendant had borrowed excessively from the copyrighted song and impaired its marketability.[120] American courts usually hold that a claimed parody comes within the scope of fair use if it is unlike any kind of use that the copyright owner itself could reasonably be expected to make[121] and that it falls outside the scope of fair use if it is the kind of use that the proprietor itself could reasonably be expected to make.[122]

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114. E.C. Copyright in the Information Society Directive Art. 5(3)(k).
115. France, Intellectual Property Code Art. L. 122.5(4).
116. Spain, Copyright Act Art. 39.
117. *See* Laddie et al. 1995, §2.113.
118. Australia, Copyright Act §41A.
119. 510 U.S. 569 (1994).
120. 510 U.S. at 589.
121. *See, e.g.*, Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).
122. Benny v. Loew's, Inc., 239 F. 2d 532 (9th Cir. 1956), *aff'd by an equally divided Court*, 356 U.S. 43 (1958).

§11.4.2 Uses by the Media

Article 2(8) of the Berne Paris Text provides that "[t]he protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information."[123] This provision, though it concerns subject matter rather than exemptions, is pivotal to press uses because the subject matter it disqualifies is the standard grist of the press mill; to bring news of the day or items of press information within copyright control could seriously hamper press operations and injure the public interest in being informed of newsworthy events.

As a complement to the press freedom to carry news of the day, Article 10*bis*(2) of the Berne Paris Text makes it a matter of legislation for member countries "to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public."[124] As the WIPO *Guide to the Berne Convention* observes, "[t]his is a matter of allowing the reporting of news, within reasonable limits. It often happens that, during the reporting of current events by film or broadcast, protected works are seen or heard. Their appearance is fortuitous and subsidiary to the report itself. For example, military music and other tunes are played on the occasion of a State visit or a sporting event; a microphone cannot avoid picking them up, even if only part of the ceremony or event is covered. It would be impossible to seek the composer's consent in advance."[125]

Many Berne member countries have enacted exemptions for news reporting under Berne Article 10*bis*(1), permitting the "reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved."[126] Article 2*bis*(2) of the Paris Text makes it a matter for national legislation "to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in

123. Berne Convention, 1971 Paris Text Art. 2(8). *See* §6.1.3.1, above.
124. Berne Convention, 1971 Paris Text Art. 10*bis*(2).
125. WIPO 1978, 62.
126. Berne Convention, 1971 Paris Text Art. 10*bis*(1). The provision adds, "Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed."

Article 11*bis*(1) of this Convention, when such use is justified by the informatory purpose."[127] The E.C. Copyright in the Information Society Directive implements the Berne Convention's news media exemptions in Articles 5(3)(c) and 5(3)(f).[128]

The E.C. Directive also allows exemptions for "use of works, such as works of architecture or sculpture, made to be located permanently in public places."[129] Such exemptions exist in Germany and the Netherlands and, for example, permit the reproduction of public buildings and sculptures on postcards. Works subject to exemption must be located "permanently in public places." According to the German Federal Supreme Court, this language excluded the Reichstag as temporarily wrapped in cloth by well-known monument-wrappers Christo and Jean-Claude.[130]

§11.4.3 Educational Uses

Many countries permit photocopying or other reproduction of copyrighted works for purposes of instruction. The Japanese Copyright Law, for example, provides broadly worded exemptions for schools and other educational institutions.[131] Authority for these exceptions can be found in the Berne Convention's long-standing exemption for teaching purposes, presently embodied in Article 10(2) of the Paris Text,[132] as well as in the safety net of Article 9(2).[133]

Under the E.C. Copyright in the Information Society Directive, Member States of the European Union may provide for limitations relating to the use of copyrighted material for the purpose of illustration for teaching or scientific research to the extent justified by the noncommercial purpose to be achieved.[134] Recital 42 of the Directive specifies that, when applying the limitation for noncommercial educational and scientific research purposes,

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127. Berne Convention, 1971 Paris Text Art. 2*bis*(2).
128. E.C. Copyright in the Information Society Directive Arts. 5(3)(c) and 5(3)(f).
129. E.C. Copyright in the Information Society Directive Art. 5(3)(h).
130. Wrapped Reichstag, Federal Supreme Court, January 24, 2002, Case I ZR 102/99, 34 I.I.C. 570 (2003) . *See also* Hundertwasser-Haus, Federal Supreme Court, June 5, 2003, Case I ZR 192/00, I.I.C. 351 (2004) (exemption applies only to photos taken from a public place, not a private house).
131. Japan, Copyright Act Arts. 35, 36.
132. According to the WIPO *Guide to the Berne Convention*, "[a]t the Stockholm Revision (1967), it was agreed that the word "teaching" included teaching at all levels—that is to say in educational institutes, municipal and state schools and private schools. From this, one can deduce that mere scientific research is not within the scope of the paragraph." WIPO 1978, 60.
133. *See* §11.1, above.
134. E.C. Copyright in the Information Society Directive Art. 5(3)(a).

including distance learning, the noncommercial nature of the activity should be determined by the activity as such, and not by its organizational structure or the means for funding the establishment.[135] Permitted limitations include privileges to record broadcast works for use in the classroom, to make anthologies of works, to perform a work in the course of activities of educational establishments, and to reproduce a work for purposes of instruction or examination.[136]

"[N]onprofit educational purposes" and "teaching (including multiple copies for classroom use)"[137] occupy a preferred place in the U.S. Copyright Act's fair use calculus. Recognizing that even these specific statutory directives left a "need for greater certainty and protection for teachers,"[138] Congress encouraged publisher and user groups to devise clear-cut guidelines for classroom uses of literary, musical, and audiovisual works that would be acceptable to both sides. The resulting book and periodical guidelines, for example, allow a teacher to make a single copy of a chapter from a book, an article from a periodical or newspaper, a short story, short essay, or short poem, or a chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper for the teacher's scholarly research or use in teaching or preparation to teach a class. Teachers may also make multiple copies for use in their classes, so long as the number of copies does not exceed the number of students in the class. Multiple copies must meet specified tests of brevity, spontaneity, and cumulative effect. The guidelines prohibit copying to create, to replace, or to substitute for anthologies, compilations, or collective works and also prohibit copying from "consumables" such as workbooks, exercises, standardized tests, and test booklets and answer sheets.[139]

Legislation in many countries exempts instructional and other nonprofit performances and displays on the ostensible ground that these worthy, and characteristically underfunded, institutions deserve special support from the copyright system. The Dutch Copyright Act carves out an exemption from the public performance right for performances and recitations for the purpose of public or not-for-profit education on condition that the performances are part of the school curriculum.[140] Similarly, the German statute exempts

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135. E.C. Copyright in the Information Society Directive Recital 42.
136. *See, e.g.*, United Kingdom, Copyright, Designs and Patents Act 1988 §§32–36; Netherlands, Copyright Act Art. 16; Germany, Copyright Act Arts. 46, 47, 53(3); *see* Lucie Guibault, *The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with Regard to General Interest Missions for the Transmission of Knowledge: Prospects for their Adaptation to the Digital Environment*, UNESCO e-Copyright Bulletin, October–December 2003, 1–45.
137. U.S. 1976 Copyright Act §107.
138. U.S. House Report, 67.
139. U.S. House Report, 67–70.
140. Netherlands, Copyright Act Art. 12(5).

certain performances in schools and welfare organizations,[141] as does the Japanese Copyright Act in the case of classroom broadcasts and cablecasts.[142] The French Intellectual Property Code provides for the payment of reduced royalties for performances in educational institutions.[143] A provision of the U.S. Copyright Act exempts the performance of copyrighted works "by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction."[144]

Emerging forms of online education (distance learning), which are gradually supplementing, and even displacing, classroom instruction, present a new challenge to copyright systems around the world. Amendments to the U.S. Copyright Act in 2002 expanded an earlier exemption for certain performances and displays made in the course of a transmission by an accredited nonprofit educational institution, enlarging both the categories of copyrighted works and the types of transmissions—most notably digital transmissions—that are subject to the exemption.[145] The E.C. Copyright in the Information Society Directive contemplates distance learning in one of its recitals, implying that distance learning exemptions would be permitted in the European Union.[146] Indeed, the German Act already permits the making available online of small parts of published works and individual articles from journals, under circumscribed conditions.[147]

§11.4.4 Library and Archival Uses

Outside the Berne Convention's general framework for exempting particular private and public uses of copyrighted works, national legislatures have carved out a variety of exemptions to accommodate the special needs of important cultural institutions, such as libraries and public archives.

These exemptions reflect a balanced regard for two distributional concerns: the need of authors to be compensated for use of their works, and the need of characteristically underfunded, but socially vital, institutions—schools and libraries, for example—to enjoy access to literary and artistic works.

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141. Germany, Copyright Act Art. 52(1).
142. Japan, Copyright Act Art. 34.
143. France, Intellectual Property Code Art. L 132-21.
144. U.S. 1976 Copyright Act §110(1).
145. U.S. 1976 Copyright Act §110(2).
146. E.C. Copyright in the Information Society Directive Recital 42. *See generally* Raquel Xalabarder, *Copyright and Digital Distance Education: The Use of Pre-Existing Works in Distance Education Through the Internet*, 26 Colum. J.L. & Arts 101 (2003).
147. Germany, Copyright Act Art. 52(a).

For example, the Japanese Copyright Act exempts library photocopying[148] and braille reproductions of published works,[149] subject to prescribed limitations. The German Copyright Act permits reproduction and distribution of limited parts of published works in anthologies exclusively for religious, school, or instructional use, subject to the author's right of equitable remuneration.[150]

The U.S. Copyright Act carves out exemptions from the reproduction right to facilitate copying by archives or libraries for purposes of interlibrary loan and for purposes of preservation or security. The Act allows a library or archives to reproduce and distribute not more than one copy or phonorecord of a work under specified conditions.[151] The privilege to reproduce "no more than one copy" means no more than one copy at a time, and the provision expressly permits "the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions."[152] Where copies are made for such essential library purposes as preservation, security, or replacement of a deteriorating copy, the provision places no limit on the kinds of copyrighted works to which the exemption applies. Where, however, copies are made for patrons, the Act excludes from the exemption musical works, pictorial, graphic, or sculptural works, and motion pictures or other audiovisual works "other than an audiovisual work dealing with news."[153]

In Europe, the E.C. Copyright in the Information Society Directive leaves room for a variety of exemptions benefiting libraries, archives, and their patrons. At the national level, some of these exemptions, such as the library privileges extensively codified in the U.K. Act,[154] are unusually complex. Many libraries are converting their holdings into digital formats, and there is increasing pressure on copyright laws to facilitate this. The Directive permits exemptions allowing digitization of works in a library's collection for purposes of preservation or restoration, and many European countries have now adopted provisions of this kind.[155] The Directive also allows library patrons to consult digitized library holdings on terminals placed on library premises.[156] However, making these digital repositories available to the general public over the Internet would require licenses from right holders, many of which will be difficult to trace. Clearing the digital rights of unidentified right holders of large numbers of works (so-called "orphan works") is one of the great

148. Japan, Copyright Act Art. 31.
149. Japan, Copyright Act Art. 37.
150. Germany, Copyright Act Art. 46.
151. U.S. 1976 Copyright Act §108(a).
152. U.S. 1976 Copyright Act §108(g).
153. U.S. 1976 Copyright Act §108(i).
154. United Kingdom, Copyright, Designs and Patents Act 1988 §§37–44.
155. E.C. Copyright in the Information Society Directive Art. 5(2)(c).
156. E.C. Copyright in the Information Society Directive Art. 5(2)(n).

challenges of collective rights management today. Some countries, such as Canada,[157] have provided relief to bona fide users, by allowing compulsory licensing on condition that the user has made "reasonable efforts" to find the copyright owner. In the Nordic countries, the mechanism of "extended collective licensing"[158] offers a more structural solution to the problem of orphan works.[159]

§11.4.5 Recording of Musical Works

Article 13(1) of the Berne Paris Text allows member countries to impose "reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any: but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."[160] Berne Article 13(3) effectively makes the license territorial: "Recordings made in accordance with paragraphs (1) and (2) of this Article and imported without permission from the parties concerned into a country where they are treated as infringing recordings shall be liable to seizure."

Today, mechanical recording licenses exist in relatively few Berne countries, including the United States, but not the Member States of the European Union, as the E.C. Copyright in the Information Society Directive leaves member states no room for such a general statutory license. The structure of the mechanical license may vary from country to country. In the United States, a nondramatic musical work will first become subject to compulsory licensing when phonorecords of the work have been distributed to

157. Canada, Copyright Act Art. 77.

158. *See* §7.6.3, above.

159. Stef van Gompel, *Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?*, 38 I.I.C. 669.

160. Berne Convention, 1971 Paris Text Art. 13(1).

Provision for mechanical compulsory licenses for music was introduced into the Berne Convention in the 1908 Berlin Act. Until the 1967 Stockholm Revision, the provision encompassed compulsory licensing for public performances from recorded compositions as well as reproduction in records. "It became clear, with the increasing public use of discs, and since public performance by this means was almost invariably covered by contract, that there was no longer any need for compulsion, and the scope of compulsory licensing could be confined to the act of recording. This was done in Stockholm (1967) and confirmed at Paris (1971)." WIPO 1978, 79.

the public within the United States by authority of the copyright owner.[161] By following the statutory procedures and paying the specified royalties, the prospective copier becomes entitled to a compulsory license to make and to distribute phonorecords of the copyrighted work. However, the compulsory license is available only if the licensee's "primary purpose in making phonorecords is to distribute them to the public for private use";[162] further, the mechanical licensee has only a limited adaptation privilege and is permitted to make changes to the work only to the extent necessary to conform it to the licensee's "style or manner of interpretation."[163]

The U.S. Copyright Act was amended in 1995 to extend the mechanical compulsory license to include "the right of the compulsory licensee to distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission which constitutes a digital phonorecord delivery."[164] The Act defines the operative term, "digital phonorecord delivery," as "each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein."[165]

§11.4.6 Other Uses

National laws provide many examples of other types of limitations, including exemptions for the visually impaired or handicapped.[166] Other exemptions vary according to local cultural traditions, and political expediency. For example, while Dutch law allows copyrighted songs to be sung during religious ceremonies,[167] the U.S. Act exempts performances of musical works by a "nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition."[168] The 1976 U.S. Act also provides qualified exemptions for religious services,[169] religious or

161. U.S. 1976 Copyright Act §115.
162. U.S. 1976 Copyright Act §115(a)(1).
163. U.S. 1976 Copyright Act §115(a)(1).
164. U.S. 1976 Copyright Act §115(c)(3).
165. U.S. 1976 Copyright Act §115(d).
166. *See, e.g.*, E.C. Copyright in the Information Society Directive Art. 5(3)(b).
167. Netherlands, Copyright Act Art. 17(c). *See also* E.C. Copyright in the Information Society Directive Art. 5(3)(g).
168. U.S. 1976 Copyright Act §110(6).
169. U.S. 1976 Copyright Act §110(3).

charitable purposes,[170] and handicapped individuals,[171] while the British Act exempts the performance of sound recordings by nonprofit organizations for charitable purposes.[172]

§11.5 Reproduction and Translation in Developing Countries

Economically developing countries must often strike the copyright balance differently than economically developed countries, favoring free use, or at least compulsory licenses, to meet deep-seated educational needs. Before their independence, many of these countries were colonies of early Berne Union members, a political fact that effectively committed them to the Convention's minimum standards of exclusive rights. While political independence might have implied that these countries could free themselves of Berne's shackles and rely instead on the Universal Copyright Convention with its lower minimum standards, Article XVII of the Universal Copyright Convention, the so-called "Berne Safeguard Clause,"[173] barred them from defecting to the U.C.C. Specifically, the Berne Safeguard Clause denied U.C.C. protection in Berne countries to works originating in a country that withdrew from Berne in favor of the U.C.C. Beginning in late 1963, the governing bodies of the Berne Union and the U.C.C. responded to mounting pressure from the developing countries and, after a tumultuous 1967 Conference in Stockholm, engineered a compromise, with revisions of both the Berne Convention and the U.C.C. signed in Paris on July 24, 1971.[174]

The Paris compromise is embodied in an appendix to the Berne Convention entitled "Special Provisions Regarding Developing Countries," and in Articles V*bis*–V*quater* of the U.C.C. The Paris Texts revised the Berne Safeguard Clause by denying U.C.C. protection in Berne countries to any member that withdrew from Berne in favor of the U.C.C., but exempting a developing

170. U.S. 1976 Copyright Act §110(4).
171. U.S. 1976 Copyright Act §110(8), (9).
172. United Kingdom, Copyright, Designs and Patents Act 1988 §67.
173. Universal Copyright Convention, 1971 Paris Text Art. XVII(2) and Appendix Declaration Relating to Article XVII.
174. On the history of the revisions, see generally Nora Maija Tocups, *The Development of Special Provisions in International Copyright Law for the Benefit of the Developing Countries*, 29 Bull. Copr. Soc'y. 402 (1982); Charles F. Johnson, *The Origins of the Stockholm Protocol*, 18 Bull. Copr. Soc'y. 91 (1970); Irwin A. Olian, Jr., *International Copyright and the Needs of Developing Countries: The Awakening at Stockholm and Paris*, 7 Cornell Int'l L. J. 81, 95–97 (1974); Robert D. Hadl, *Toward International Copyright Revision: Report on the Meetings in Paris and Geneva, September 1970*, 18 Bull. Copr. Soc'y. 183 (1970).

country from the Safeguard Clause if, at the time it withdrew from Berne, it issued the prescribed notification that it is a developing country.[175]

Roughly parallel provisions of the 1971 Berne and U.C.C. Paris Texts subject both the translation right and the reproduction right to compulsory licenses in developing countries.[176] In the case of the translation right, qualifying countries may replace exclusive rights with nontransferable, nonexclusive licenses under conditions that include the expiration of at least three years from a work's publication, if a translation "has not been published in a language in general use in that country by the owner of the right of translation," provided that the license "shall be granted only for the purpose of teaching, scholarship or research."[177] In the case of the reproduction right, the compulsory license is limited to copies made for use in systematic instructional activities and is available if copies have not, within five years of publication, been distributed for this purpose at a reasonable price; in the case of works in the natural and physical sciences, the minimum period is reduced to three years, and in the case of fiction, poetry, drama, music, and art books, it is increased to seven years.[178] No compulsory license can allow the export of copies from the qualifying country.[179]

§11.6 External Constraints on Copyright

The structure of the international copyright conventions, based on minimum rights and maximum limitations subject to the three-step test, may suggest a

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175. Universal Copyright Convention, 1971 Paris Text, Appendix Declaration Relating to Article XVII.

176. On qualification as a "developing country," see Berne Convention, 1971 Paris Text, Appendix, Special Provisions Regarding Developing Countries Art. I(1) ("Any country regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations which ratifies or accedes to this Act, of which this Appendix forms an integral part, and which, having regard to its economic situation and its social or cultural needs, does not consider itself immediately in a position to make provision for the protection of all the rights as provided for in this Act, may, by a notification deposited with the Director General at the time of depositing its instrument of ratification or accession or, subject to Article V(1)(c), at any time thereafter, declare that it will avail itself of the faculty provided for in Article II, or of the faculty provided for in Article III, or of both of those faculties. It may, instead of availing itself of the faculty provided for in Article II, make a declaration according to Article V(1)(a).")

    See also Universal Copyright Convention, 1971 Paris Text Art. V*bis*.

177. Berne Convention, 1971 Paris Text, Appendix Arts. II(2)(*a*) and (5). *See also* Universal Copyright Convention, 1971 Paris Text Art. V*ter*.

178. Berne Convention, 1971 Paris Text, Appendix Art. III. *See also* Universal Copyright Convention, 1971 Paris Text Art. V*quater*.

179. Berne Convention, 1971 Paris Text, Appendix Art. IV(4)(a). *See also* Universal Copyright Convention, 1971 Paris Text Arts. V*ter*(4)(a), V*quater* 1(f).

closed system allowing no additional limits from outside legal sources. However, at the level of national law, the norms of copyright inevitably compete with other legal norms. For example, public broadcasting regulation may require certain news reporting exemptions,[180] while general doctrines of misuse or abuse of right may impose external limits on the exercise of copyrights in special cases. Constitutionally protected freedom of expression, too, may constrain copyright control.

§11.6.1 Misuse and Abuse of Copyright

It is a much-vexed question whether, and in what circumstances, courts will question a copyright owner's motives in refusing to license its work on reasonable terms or on any terms at all. One writer, noting the existence of a doctrine of abuse of rights in French civil law, observed, "the fact nevertheless remains that it is a delicate matter to use this notion in literary and artistic property law. Indeed, it may be difficult to accept the principle that authors may misuse their rights because it leads quite simply to the removal of the sacred aura surrounding those whom the gentlemen of the Enlightenment labeled 'the most respectable citizens.'"[181]

The Berne Convention's rigorous limitations on exemptions and statutory licenses reflect the special relationship that exists between an author and his intellectual creation. Since the explanation for this general deference to authorial autonomy lies in the special qualities of artistic endeavor, it is no coincidence that inroads on this autonomy through the doctrine of abuse of copyright, or similar doctrines, have occurred in cases involving factual or functional works possessing a low degree of authorship. For example, in the much-discussed *Magill* decision[182] the European Court of Justice ruled that it was an abuse of dominant position under Article 82 (formerly Article 86) of the E.C. Treaty, and beyond the proper function of copyright as contemplated

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180. For example, Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332/27 (18.12.2007) (E.C. Audiovisual Media Services Directive), Art. 3k (1) reads: "Member States shall ensure that for the purpose of short news reports, any broadcaster established in the Community has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction."

181. Caron 1998, 4.

182. Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission (*Magill*), ECJ April 6, 1995, Joined cases C-241/91 and C-242/91, [1995] ECR I 743. *See also* NDC Health Corporation and NDC Health v. IMS Health Inc. and Commission, ECJ April 29, 2004, Case C-481/01.

by Article 30 (formerly Article 36) of the Treaty, for three television broadcasters to refuse to license their copyrighted weekly program listings to Magill, which wanted to publish a comprehensive television guide incorporating the program information of the three broadcasters. The court noted that mere ownership of copyright does not confer a dominant position, but that the broadcasters' *de facto* monopoly over their own programming information put them "in a position to prevent effective competition on the market in weekly television magazines," effectively a dominant position. In the court's view, the broadcasters' "refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand," constituting abuse of dominant position under Article 82 (formerly 86) of the Treaty.[183]

In the United States, an infringer may invoke the defense of copyright misuse by showing that the copyright owner has violated a specific legal norm in enforcing its copyright, with consequent injury to the infringer. The operative legal norm will typically be embodied in general rules on unfair competition or antitrust policy.[184] As in other countries, the misuse defense has been strongest where the justification for copyright is weakest—cases involving fact works or functional works such as computer programs. In one case, for example, the court held that where a competing microprocessor card developed for use on plaintiff's phone switches had to be compatible with plaintiff's operating system software, and where, to achieve compatibility, defendant competitor had to make a copy of the copyrighted operating system in order to test the card, defendant could prevail on a misuse defense because plaintiff was using "its copyright to obtain a patent-like monopoly over unpatented microprocessor cards."[185]

In civil law countries, the doctrine of *abuse* of right developed in general civil law may offer an additional safety valve in cases of disproportionate exercise of copyright's prerogatives. This doctrine appears to be particularly well developed in France.[186]

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183. *Magill* at §§ 46–56. *See also* Microsoft Corp. v. Commission, Court of First Instance, September 17, 2007, Case T-201/04, 39 I.I.C. 504 (2008) (refusal to provide interoperability information to Microsoft's competitors on workgroup server software market deemed abuse of dominant position).
184. *See* Goldstein 1996, §9.6.1.
185. DSC Communications Corp. v. DGI Technologies, Inc., 81 F.3d 597, 601 (5th Cir. 1996).
186. *See* Lucie Guibault, Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright 280–283 (2002); Caron 1998, 3.

§11.6.2 Freedom of Expression

Another possible external constraint on copyright control is freedom of expression. In Europe, freedom of expression is recognized as a fundamental right at two levels, that of national constitutions and that of the European Convention on Human Rights.[187] In civil law countries, where copyright limitations and exceptions are often narrowly circumscribed and exhaustively enumerated, free speech may offer a safety valve when application of the letter of the law would lead to unjust results. Freedom of expression defenses have been particularly successful in national courts in Europe in cases where literal copying was considered inevitable, for example, for purposes of literal quotation or in cases of "live" broadcasting of works of art.[188]

In 2000 the Federal Constitutional Court of Germany opined on the conflict between copyright and free speech in its landmark *Germania 3* decision concerning a theatrical work that contained extensive quotations, for a total of four pages, from works by playwright Berthold Brecht. Although the amount borrowed well exceeded the limits normally imposed by the statutory quotation right, the Court held that, in light of the freedom of artistic expression embedded in Article 5(3) of the German Federal Constitution, the quotation right deserved broad application with respect to artistic works. Authors, the Court reasoned, must to a certain degree accept that works of art gradually enter the public domain and that copyright exemptions should be interpreted accordingly, to reflect a balancing of relevant interests. In the case at hand, the Court ruled, the commercial interests of the copyright owner should give way to the user's interest in providing artistic commentary.[189]

The French Supreme Court, while accepting in principle that copyright will on occasion find its limits in free speech, has attached somewhat less weight to free speech interests. In a case brought against national broadcaster

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187. European Convention on Human Rights (ECHR), signed in Rome on November 4, 1950. Article 10 ECHR reads: "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." In many European states the norms of the Convention are deemed self-executing, i.e., may be invoked directly before the courts.

188. *See* P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, *in* Expanding the Boundaries of Intellectual Property. Innovation Policy for the Knowledge Society 343–363 (Rochelle Cooper Dreyfuss et al. eds., 2001).

189. "Germania 3 Gespenster am toten Mann" Federal Constitutional Court, June 29, 2000, [2000] Zeitschrift für Urheber- und Medienrecht (ZUM) 867. The German Federal Supreme Court is less activist; *see, e.g.*, "Gies eagle," Federal Supreme Court, March 20, 2003, Case I ZR 117/00, 35 I.I.C. 984 (2004) (copyright law exhaustively regulates access to works; copyright must be interpreted in accordance with constitution, but does not allow a balancing of interests outside copyright); *see* Silke von Lewinski, *News from Germany*, 205 R.I.D.A. 279 (2005).

France 2 for displaying twelve Utrillo paintings in a two-minute news item on a Utrillo exhibition, the Court of Cassation held that a showing of these paintings was not essential to inform the public of the exhibition, and that, therefore, a free speech defense could not succeed.[190] On the other hand, the Court of Cassation did find a conflict with freedom of expression when the world football organization FIFA invoked copyright protection for the design of the FIFA World Cup against a newspaper publisher that used a picture of the cup for a photomontage on the cover of a football magazine. According to the French Supreme Court, the trophy "symbolizes every professional footballer's dream" and is therefore "inseparable from the act of informing the public on the course of this major news event," as guaranteed by the freedom of expression and information enshrined in Article 10 ECHR.[191]Courts in the United States have given constitutionally protected free speech virtually no express role in copyright decisions. The reason, of course, is that, from the beginning, copyright jurisprudence in the United States developed alongside, and assimilated the values embodied in, the robust free speech guarantees of the First Amendment to the U.S. Constitution. In the view of the U.S. Supreme Court, doctrines such as fair use and the idea-expression distinction make explicit resort to constitutional principles unnecessary;[192] indeed, as one Supreme Court Justice observed, "copyright itself" was intended "to be the engine of free expression."[193] More recently, the Supreme Court has opened the door to First Amendment challenges to copyright, holding that the Copyright Act is not "categorically immune from challenges under the First Amendment," and that the First Amendment might require overturning a copyright doctrine that "altered the traditional contours of the protection."[194] At least one appellate court has gone through that door, ruling that amendments intended to bring the Copyright Act into compliance with Berne Article 18 by restoring copyright in certain foreign works deviated from the traditional principle "that works in the public domain stay there."[195]

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190. Utrillo, Court of Cassation, November 13, 2003, 200 R.I.D.A. 290 (2003).
191. France, HFA v. FIFA, October 2, 2007, 214 R.I.D.A. 338 (2007).
192. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985).
193. 471 U.S. at 558.
194. Eldred v. Ashcroft, 537 U.S. 186, 221.
195. Golan v. Gonzales, 501 F.3d 1179, 1189 (10th Cir. 2007).

CHAPTER
12

Enforcement

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Historically, treaties have provided few minimum standards for the remedies for copyright infringement. The Berne Convention, for example, generally leaves "means of redress" to local legislation[1] and imports a specific remedial requirement only in the provisions of Articles 13 and 16 on seizure of infringing copies.[2] International copyright agreements did not begin to introduce minimum standards for a generalized system of remedies until the end of the twentieth century. The TRIPs Agreement, signed in 1994, requires WTO Members to "ensure that enforcement procedures as specified [in Part III] are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements."[3] Such enforcement procedures "shall be fair and equitable" and not be "unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays."

Part III of the Agreement sets out in detail a comprehensive set of minimum enforcement standards, requiring local judicial authorities to have the power to order disclosure of evidence,[4] issue injunctions,[5] assess damages,[6] order seizure and disposition of offending goods,[7] and impose border controls.[8] Implicitly recognizing the limited resources that may be available to developing nations for the judicial enforcement of intellectual property rights, the TRIPs Agreement "does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of members to enforce their law in general."[9]

The 1996 WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty require contracting parties to "ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements."[10] The two treaties also aim to bolster

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1. *See*, *e.g.*, Berne Convention, 1971 Paris Text Arts. 5(2) and 6*bis*(3). "Although the Convention does not say so expressly except in relation to seizure, all sanctions on infringers are left to national legislation. Remedies may be civil, criminal or administrative: injunctions, damages, fines and/or prison sentences are examples. The courts can usually be trusted to mitigate the punishment when lenience for the infringer is deserved." WIPO 1978, 98.
2. Berne Convention, 1971 Paris Text Arts. 13(3) and 16.
3. TRIPs Agreement Art. 41(1).
4. TRIPs Agreement Art. 43.
5. TRIPs Agreement Art. 44.
6. TRIPs Agreement Art. 45.
7. TRIPs Agreement Art. 46.
8. TRIPs Agreement Art. 50–60.
9. TRIPs Agreement Art. 41(5).
10. WIPO Copyright Treaty Art. 14(2); WIPO Performances and Phonograms Treaty Art. 23(2).

copyright owners' efforts at self-help through technical measures, such as encryption, to protect their works from infringement.[11]

The E.C. Enforcement Directive of 2004 has harmonized civil remedies for the Member States of the European Union. While largely based on the minimum standards established by the TRIPs Agreement,[12] the Directive, inspired by "best practices" in member states, prescribes several remedies in excess of the TRIPs minima.[13]

As a rule, copyright legislation, and in some cases local procedural codes, empower courts to issue preliminary and permanent relief against continuing infringements of copyright. Usually this legislation will not condition an award of coercive relief on proof that the defendant knew, or even disregarded, the infringing nature of its conduct. Compensatory monetary relief is also generally available and in most countries requires a showing that the defendant knew, or recklessly disregarded the fact, that its conduct was infringing. The TRIPs Agreement reinforces procedures already in place in many countries by providing a procedural framework for customs interdiction of pirated copies at a member country's border.[14]

§12.1 Coercive Remedies

Coercive remedies are an essential weapon in a copyright owner's litigation arsenal. In many, if not most, cases, a court order enjoining further infringement will better serve the right holder than ex post compensation for damages following a (sometimes protracted) judicial proceeding on the merits of a case. Coercive remedies range from temporary injunctions, to measures to preserve evidence granted in ad interim procedures, to more permanent remedies issued as part of a final judgment in a case.

§12.1.1 Temporary Remedies

Subject to prescribed safeguards, Article 50 of the TRIPs Agreement requires "judicial authorities" in member counties to "have the authority to order prompt and effective provisional measures . . . to prevent an infringement of

11. WIPO Copyright Treaty Art. 11; WIPO Performances and Phonograms Treaty Art. 18. *See* §9.1.6, above.
12. See §3.4.1.5, above.
13. *See e.g.* E.C. Enforcement Directive Art. 8 (right of information), Art. 10 (recall), Art. 11 (injunctive relief against intermediaries) and Art. 14 (legal costs).
14. TRIPs Agreement Section 4 (Arts. 51–60, "Special Requirements Related to Border Measures").

any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance."[15] Such provisional measures will, however, cease to have effect "if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer."[16] As a rule, preliminary, pretrial relief is available to enjoin copyright infringements without the requirement of any showing that the defendant committed the infringement intentionally or negligently.

In Europe, the E.C. Enforcement Directive requires member states to ensure that the judicial authorities may issue interlocutory injunctions, "subject, where appropriate, to a recurring penalty payment where provided for by national law," and that they may order the seizure of goods suspected to be infringing.[17]

In line with the Directive, the French Intellectual Property Code authorizes grants of expedited provisional relief that can include seizure of the allegedly infringing goods.[18] The German Copyright Act provides for injunctive relief "requiring the wrongdoer to cease and desist if there is a danger of repetition of the acts of infringement."[19] Under British practice, preliminary injunctions, called interlocutory injunctions, are regularly granted before trial upon the copyright owner's showing of a probability of success on the merits of the case and that the balance of conveniences favors it rather than defendant.[20] Canadian practice is similar.[21] The U.S. Copyright Act authorizes courts to grant temporary restraining orders and temporary injunctions to preserve the parties' positions during pretrial proceedings and trial.[22] The Copyright Act authorizes nationwide service and enforcement of temporary injunctions, and courts possess substantial discretion to shape the terms of the temporary injunction in order to secure the status quo. For example, in addition to enjoining infringement, a court may order the defendant to use its best efforts to recall infringing goods from the marketplace.

The TRIPs Agreement further requires that the judicial authorities of WTO Members have "the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause

15. TRIPs Agreement Art. 50(1)(a).
16. TRIPs Agreement Art. 50(6).
17. E.C. Enforcement Directive Art. 9(1)(a) and (b).
18. France, Intellectual Property Code Art. L 332-1.
19. Germany, Copyright Act Art. 97(1).
20. *See* Skone James et al. 1991, §§11-35 through 11-47.
21. *See* Ann Carlsen, *Canada*, *in* Copyright Infringement 45, 74 (Susan Cotter ed., 1997).
22. U.S. 1976 Copyright Act §§502–503.

irreparable harm to the right holder."[23] For the Member States of the European Union, this obligation is repeated in the E.C. Enforcement Directive, which has led to the introduction in several member states, such as the Netherlands,[24] of ex parte injunctive relief.[25] In other member states, such as Germany[26] and the United Kingdom,[27] ex parte interlocutory measures were already available prior to the Directive.

Article 16 of the Berne Convention, which in somewhat different form has been part of the treaty from the beginning, requires that "[i]nfringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection,"[28] and that this remedy "shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected."[29] Article 51 of the TRIPs Agreement has introduced a significant remedial norm in its provision requiring member countries to adopt procedures for border measures against importation of counterfeit trademark or pirated copyright goods.

Preservation of evidence is another important provisional tool for copyright owners. Article 50(1)(b) of the TRIPs Agreement directs WTO Member States to provide for measures "to preserve relevant evidence in regard to the alleged infringement." Inspired by existing practices in the United Kingdom and France, the E.C. Enforcement Directive transposes this TRIPs obligation in some detail. If necessary, such measures shall be imposed ex parte and might include "the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto."[30]

National legislatures have taken a variety of approaches to preliminary coercive remedies aimed at preserving evidence. One is the so-called Anton Piller Order, innovated[31] and statutorily codified[32] in the United Kingdom

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23. TRIPs Agreement Art. 50(2); *see also* E.C. Enforcement Directive Art. 9(4)
24. Netherlands, Code of Civil Procedure Art. 1019(e).
25. E.C. Enforcement Directive Art. 9(4).
26. Germany, Code of Civil Procedure Art. 935 ff.
27. United Kingdom, "Anton Piller order"; *see* §12.1.1, below.
28. Berne Convention, 1971 Paris Text, Art. 16(1).
29. Berne Convention, 1971 Paris Text, Art. 16(2). Article 16(3) leaves it to local legislation to prescribe rules on seizure.

    Article 13, subclauses (1) and (2), of the 1971 Berne Paris Text deal with equitable remuneration for mechanical licenses for recorded musical compositions. *See* §11.4.5, above. Article 13(3) provides: "Recordings made in accordance with paragraphs (1) and (2) of this Article and imported without permission from the parties concerned into a country where they are treated as infringing recordings shall be liable to seizure."
30. E.C. Enforcement Directive Art. 7(1).
31. Anton Piller v. Manufacturing Processes, [1976] Ch. 55.
32. *See* Supreme Court Act, 1981, c. 54, § 72.

and employed elsewhere in Commonwealth countries.[33] This procedure allows copyright owners to petition, *in camera* and ex parte, for an order requiring the defendant to open its premises to the plaintiff's attorney, who may then seize any articles, most commonly infringing materials, needed to preserve evidence of the infringement. Several procedural safeguards aim to protect defendants faced with these orders.[34]

Confiscation pending trial is also a feature of coercive remedies under civil law. Upon application by the copyright owner, the French Intellectual Property Code authorizes pretrial seizure of allegedly infringing copies (the so-called *saisie-contrefaçon*).[35]

The U.S. Copyright Act provides that any time an action under the Act is pending, "the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced."[36] According to the legislative history of the Act, allegedly infringing articles may be seized "as soon as suit has been filed and without waiting for an injunction."[37] Impoundment effectively secures temporary injunctive relief by sequestering the products and instruments of infringement.

§12.1.2 Permanent Remedies

Permanent injunctive relief is generally available to a prevailing copyright owner without any proof required that the defendant acted knowingly or that the copyright owner would be irreparably harmed if an injunction failed to issue. For example, the E.C. Enforcement Directive requires that permanent injunctive relief "aimed at prohibiting the continuation of the infringements" be available after full court proceedings, subject to a recurring penalty payment in the case of noncompliance with the injunction.[38] In line with the E.C. Copyright in the Information Society Directive,[39] the Enforcement Directive

33. *See*, *e.g.*, cases cited and discussed in H.J. Erasmus, *Anton Piller Orders in South African Practice*, 101 South African L.J. 324 (1984); Jeffrey Berryman, *Anton Piller Injunctions: An Update*, 2 Int. Prop. J. 49 (1986).
34. *See generally* Steven Gee, Mareva Injunctions and Anton Piller Relief (3d ed. 1995); Anne Staines, *Protection of Intellectual Property Rights: Anton Piller Orders*, 46 Mod. L. Rev. 274 (1983).
35. France, Intellectual Property Code Art. L. 332-1.
36. U.S. 1976 Copyright Act §503(a).
37. U.S. House Report, 160.
38. E.C. Enforcement Directive Art. 11.
39. E.C. Copyright in the Information Society Directive Art. 8(3).

obligates member states to ensure that injunctions are also available against "intermediaries whose services are used by a third party to infringe an intellectual property right."[40] Thus, a European Internet service provider might be subjected to an injunction, even if it would not be liable for damages.[41] The Enforcement Directive also prescribes a variety of other corrective measures, including the recall or removal of infringing goods and manufacturing implements from the channels of commerce or their destruction.[42] In line with the Directive, the German legislation augments the award of permanent injunctive relief[43] with the prospect of equitable disposition, including possible destruction or delivery to the copyright owner, of infringing copies and equipment.[44] In the United Kingdom, where injunctive relief is available as a matter of right to a prevailing copyright owner, the Copyright, Designs and Patents Act authorizes the court to order delivery of infringing copies to the copyright owner.[45]

Courts in the United States freely grant final injunctions upon a finding of copyright infringement. Final injunctive relief is not automatic, however, and a court will deny a final injunction if it appears that the defendant is unlikely to infringe in the future.[46] In cases where the infringing work borrows only in part from the copyrighted work and contains substantial value of its own, American courts will if possible tailor the injunctive decree to require only that the infringing matter be expunged. But if, as will often be the case with derivative works such as translations and motion pictures, the infringing and noninfringing material are closely intertwined, courts will enjoin the entire infringing work. American courts, including the U.S. Supreme Court, have occasionally held or suggested that the preferable alternative in these cases is to withhold injunctive relief entirely and award the copyright owner damages or profits allocable to the infringing portions of the defendant's work.[47]

As a counterpart to the provisional remedy of impoundment, the U.S. Copyright Act provides that as "part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright

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40. E.C. Enforcement Directive Art. 11, last sentence; Art. 9(1)(a) prescribes the same by way of provisional measure.
41. *See* §9.1.5, above.
42. E.C. Enforcement Directive Art. 10(1).
43. Germany, Copyright Act Art. 97.
44. Germany, Copyright Act Arts. 98, 99.
45. United Kingdom, Copyright, Designs and Patents Act 1988 §99(1).
46. *See, e.g.*, Harolds Stores, Inc. v. Dillard Dept. Stores, Inc., 82 F.3d 1533, 1555–1556 (10th Cir. 1996) (plaintiff not entitled to permanent injunction where there was no probability defendant would continue to infringe existing copyrighted designs and no substantial likelihood it would infringe future designs).
47. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006); Dun v. Lumbermen's Credit Association, 209 U.S.20 (1908).

owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced."[48] By specifically providing for "other reasonable disposition," the Act gives courts flexibility in tailoring the final disposition of infringing articles and paraphernalia. As examples, the legislative history on the Act suggests that "as part of its final judgment or decree, the court could order the infringing articles sold, delivered to the plaintiff, or disposed of in some other way that would avoid needless waste and best serve the ends of justice."[49]

Discovery practice in the United States has not only armed copyright plaintiffs with procedures for requiring defendants to disclose information bearing on the alleged infringement, but it has provided plaintiffs and defendants alike with wide-ranging access to information about the other's activities. While the TRIPs Agreement leaves WTO States the option to provide for a "right of information" respecting the origin and distribution networks of infringing goods or services,[50] the E.C. Enforcement Directive directs the judicial authorities in the European Union to order alleged infringers, or other parties directly involved in the infringement, such as producers, manufacturers, suppliers, and distributors, to disclose information on the provenance of infringing goods and services.[51]

§12.2 Monetary Remedies

Article 45(1) of the TRIPs Agreement requires judicial authorities in member states to "have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of his intellectual property right by an infringer who knew or had reasonable grounds to know that he was engaged in infringing activity." Article 45(2) adds that in "appropriate cases," judicial authorities may award "profits and/or payment of pre-established damages even where the infringer did not knowingly or with reasonable grounds to know, engage in infringing activity."[52]

Monetary relief in both civil and common law jurisdictions generally adheres to the same pattern and, with the notable exception of the United States, to

48. U.S. 1976 Copyright Act §503(b).
49. U.S. House Report, 160.
50. TRIPs Agreement Art. 47.
51. E.C. Enforcement Directive Art. 8.
52. TRIPs Agreement Article 45(2) also authorizes awards of expenses, including "appropriate attorney's fees" against the infringer.

the requirement that the infringer's knowledge, or negligent disregard, of the infringement be shown before damages can be recovered. For example, the E.C. Enforcement Directive requires courts in member states to award damages against infringers "who knowingly, or with reasonable grounds to know, engaged in an infringing activity."[53] National practice varies on whether, and to what extent, a copyright owner can recover damages incurred in a country other than the one in which the infringement occurred.[54]

Article 97(1) of the German Copyright Act, making anyone who intentionally or negligently infringes another's copyright answerable for damage, is in many ways typical of national approaches to computation of damages generally. One, largely theoretical, computational method draws on general civil law principles and would subtract the value of the copyright following the infringement from its value before the infringement and award the difference to the copyright owner.[55] A second, widely applied approach, called the "license analogy," rests on the same economic foundation as the first method and awards the copyright owner the amount that he would reasonably have accepted, and that the infringer would reasonably have paid, for a license that encompassed the infringing activity.[56] A third measure would require the defendant to account for its profits from the infringing activity on the premise that profits earned by the defendant will be equal to those lost to the plaintiff. Apart from its questionable logic, this measure is rarely used, according to Professor Dreier, because "it is difficult to prove which part of the infringing profits may be causally linked to the particular infringement."[57] As an alternative, which does not require proof of the defendant's intention or negligence, the copyright owner can recover the defendant's profits on a theory of unjust enrichment.[58]

Article 13(1) of the E.C. Enforcement Directive allows courts in member states to apply a variety of computational methods: "When the judicial authorities set the damages: (a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement; or (b) as an

53. E.C. Enforcement Directive Art. 13.
54. *See* §4.3.3.1.b, above.
55. *See* Thomas Dreier, *Damages for Copyright Infringement in Germany*, *in* Kabel & Mom 1998, 129–130. *See also* Adolf Dietz, *News from Germany (II)*, 176 R.I.D.A. 166, 258 (1998).
56. *See* Thomas Dreier, *Damages for Copyright Infringement in Germany*, *in* Kabel & Mom 1998, 131.
57. *See* Thomas Dreier, *Damages for Copyright Infringement in Germany*, *in* Kabel & Mom 1998, 132.
58. Germany, Copyright Act Art. 97(1). *See generally* Thomas Dreier, *Damages for Copyright Infringement in Germany, in* Kabel & Mom 1998, 133–134.

alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question."[59] The Directive does not, however, accept the concept of punitive damages.[60]

Modest variations on the basic economic principles underlying the Enforcement Directive's prescription for monetary relief appear in the legislation of other countries. The Japanese Copyright Act establishes two presumptions respecting the damage suffered by a copyright owner: that the infringer's profits are equivalent to the copyright owner's damages[61] and that damages correspond to the sum ordinarily to be received from exercise of the right infringed.[62] Under British practice, the prevailing copyright owner can recover compensatory damages, or an accounting of profits,[63] as well as additional damages, "as the justice of the case may require" in light of the flagrancy of the infringement and the benefit enjoyed by the defendant from the infringement.[64]

The U.S. Copyright Act provides that a successful copyright plaintiff may recover "the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages."[65] According to the legislative history of the Act, "the provision recognizes the different purposes served by awards of damages and profits. Damages are awarded to compensate the copyright owner for losses from the infringement, and profits are awarded to prevent the infringer from unfairly benefiting from a wrongful act."[66]

American courts generally employ either of two basic measures of damages. If the infringer is in the same market as the copyright owner, courts will employ lost sales as the measure of damages, on the assumption that every sale made by the defendant is one that otherwise would have been made by the copyright owner. If the infringer occupies a different market than the copyright owner, courts will employ a reasonable royalty measure of damages, on the assumption that the value of the copyrighted work in the infringer's market corresponds to the sum that the infringer would have agreed to pay for licensing the work in that market.

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59. E.C. Enforcement Directive Art. 13(1).
60. E.C. Enforcement Directive Recital 26.
61. Japan, Copyright Act Art. 114(1).
62. Japan, Copyright Act Art. 114(2).
63. United Kingdom, Copyright, Designs and Patents Act 1988 §96(2).
64. United Kingdom, Copyright, Designs and Patents Act 1988 §97(2).
65. U.S. 1976 Copyright Act §504(b).
66. U.S. House Report, 161.

In the case of profits, the copyright owner bears the burden of proving the infringer's gross revenues, and the infringer bears the burden of proving "deductible expenses and the elements of profit attributable to factors other than the copyrighted work."[67] In the latter case, courts will, if they can separate the infringing and noninfringing elements of defendant's work, usually take the relative proportions of the two sets of elements as a starting point in determining an award of profits allocable to the infringement.

The U.S. Copyright Act entitles the copyright owner to recover, as an alternative to actual damages and profits, an award of statutory damages within prescribed minimum and maximum amounts—between $750 and $30,000 in ordinary cases[68]—"for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally."[69] The Act also gives courts in copyright cases the authority to "award a reasonable attorney's fee to the prevailing party as part of the costs," in line with Article 45(2) of the TRIPs Agreement.[70] In Europe, the E.C. Enforcement Directive effectively obligates member states to ensure compensation by the unsuccessful party of "reasonable and proportionate legal costs and other expenses incurred by the successful party."[71]

§12.3 Criminal Sanctions

Criminal liability for copyright infringement, long a relatively dormant feature of copyright legislation around the world, was substantially invigorated by initiatives to control piracy of phonorecords, videotapes, and software beginning in the 1980s. The central sanctions for criminal copyright infringement are fines and terms of imprisonment, both of which were in many countries increased as part of the antipiracy initiative. Infringement is generally considered to be an economic crime, and differences exist from country to country over whether infringement of an author's moral right should come within the criminal sanction. Most national legislation imposes a higher standard of willfulness on criminal defendants than on civil defendants, but

67. U.S. 1976 Copyright Act §504(b).
68. In the case of willful infringement, the court may increase the award to a sum of not more than $150,000, and in the case of innocent infringement, the court may reduce the award to a sum of not less than $200. U.S. 1976 Copyright Act §504(c).
69. U.S. 1976 Copyright Act §504(c)(1). To be entitled to an award of statutory damages, as well as of attorney's fees, the copyright owner must make a timely registration of its claim to copyright. U.S. 1976 Copyright Act §412.
70. U.S. 1976 Copyright Act §505.
71. E.C. Enforcement Directive Art. 14.

national legislation varies on the role of evidential presumptions in proving guilt and the elements essential to a prima facie case.

§12.4 Customs (Border) Measures

In addition to civil and criminal enforcement, Part III, Section 4 of the TRIPs Agreement prescribes additional relief for right holders in cases of "piracy." Article 51 directs WTO Members to establish procedures authorizing national customs authorities to suspend the importation of "counterfeit trademark or pirated copyright goods" upon the right holders' request.[72] "Pirated copyright goods" are defined as "any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation."[73]

WTO Members may elect to apply these procedures to parallel imports as well[74] and may exclude from the application of these procedures imports of small quantities of goods of a noncommercial nature contained in travelers' personal luggage or sent in small consignments.[75] Article 51 leaves it to member states to decide whether to apply corresponding procedures to the suspension by customs authorities of infringing goods destined for exportation from their territories, or to goods in transit.

In line with the TRIPs provisions, most countries now provide for border procedures. The U.S. Copyright Act differentiates between piratical goods—copies or phonorecords made without permission from the copyright owner—and copies or phonorecords lawfully manufactured and marketed abroad, but whose importation into the United States violates the terms of a territorial licensing agreement with the copyright owner. Section 602(a) of the Act encompasses both piratical goods and parallel imports and provides that their unauthorized importation into the United States infringes the Act's exclusive right to distribute copies and phonorecords to the public. Section 602(b) prohibits—and authorizes U.S. Customs and Border Protection to bar—the importation of piratical goods, but not of gray market goods.

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72. TRIPs Agreement Art. 51.
73. TRIPs Agreement Art. 51, footnote 14.
74. TRIPs Agreement Art. 51, footnote 13.
75. TRIPs Agreement Art. 60.

In the European Union, border measures are regulated in great detail by Council Regulation No. 1383/2003, which was adopted on July 22, 2003.[76] The Regulation has direct effect in all member states and therefore does not require implementation at the national level. In line with the TRIPs Agreement, the European rules apply only in respect of suspected counterfeit and pirated goods. The Regulation allows customs authorities in the European Union not only to suspend the release of suspect goods upon application of the right holder, but also to act ex officio in order to enable right holders to submit an application.[77]

76. Council Regulation (EC) No. 1383/2003 06 22 July 2003, OJ No. L196/7, August 2, 2003.
77. Council Regulation No. 1383/2003 Art. 4.

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APPENDIX
1

Berne Convention for the Protection of Literary and Artistic Works [Paris Text, 1971]

[Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at PARIS on May 4, 1896, revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, and amended on September 28, 1979.]

The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works,

Recognizing the importance of the work of the Revision Conference held at Stockholm in 1967,

Have resolved to revise the Act adopted by the Stockholm Conference, while maintaining without change Articles 1 to 20 and 22 to 26 of that Act.

Consequently, the undersigned Plenipotentiaries, having presented their full powers, recognized as in good and due form, have agreed as follows:

ARTICLE 1

The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.

ARTICLE 2

(1) The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic

works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

(2) It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.

(3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

(4) It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.

(5) Collections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

(6) The works mentioned in this Article shall enjoy protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title.

(7) Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.

(8) The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.

ARTICLE 2*bis*

(1) It shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings.
(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11bis(1) of this Convention, when such use is justified by the informatory purpose.
(3) Nevertheless, the author shall enjoy the exclusive right of making a collection of his works mentioned in the preceding paragraphs.

ARTICLE 3

(1) The protection of this Convention shall apply to:
  (a) authors who are nationals of one of the countries of the Union, for their works, whether published or not;
  (b) authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union.
(2) Authors who are not nationals of one of the countries of the Union but who have their habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals of that country.
(3) The expression "published works" means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.
(4) A work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication.

ARTICLE 4

The protection of this Convention shall apply, even if the conditions of Article 3 are not fulfilled, to:

(a) authors of cinematographic works the maker of which has his headquarters or habitual residence in one of the countries of the Union;

(b) authors of works of architecture erected in a country of the Union or of other artistic works incorporated in a building or other structure located in a country of the Union.

ARTICLE 5

(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.

(4) The country of origin shall be considered to be:

(a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;

(b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;

(c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:

(i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and

(ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.

ARTICLE 6

(1) Where any country outside the Union fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union, the latter country may restrict the protection given to the works of authors who are, at the date of the first publication thereof, nationals of the other country and are not habitually resident in one of the countries of the Union. If the country of first publication avails itself of this right, the other countries of the Union shall not be required to grant to works thus subjected to special treatment a wider protection than that granted to them in the country of first publication.

(2) No restrictions introduced by virtue of the preceding paragraph shall affect the rights which an author may have acquired in respect of a work published in a country of the Union before such restrictions were put into force.

(3) The countries of the Union which restrict the grant of copyright in accordance with this Article shall give notice thereof to the Director General of the World Intellectual Property Organization (hereinafter designated as "the Director General") by a written declaration specifying the countries in regard to which protection is restricted, and the restrictions to which rights of authors who are nationals of those countries are subjected. The Director General shall immediately communicate this declaration to all the countries of the Union.

ARTICLE 6*bis*

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

ARTICLE 7

(1) The term of protection granted by this Convention shall be the life of the author and fifty years after his death.

(2) However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making.

(3) In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in paragraph (1). If the author of an anonymous or pseudonymous work discloses his identity during the above-mentioned period, the term of protection applicable shall be that provided in paragraph (1). The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.

(4) It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.

(5) The term of protection subsequent to the death of the author and the terms provided by paragraph (2), paragraph (3) and paragraph (4) shall run from the date of death or of the event referred to in those

paragraphs, but such terms shall always be deemed to begin on the first of January of the year following the death or such event.

(6) The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs.

(7) Those countries of the Union bound by the Rome Act of this Convention which grant, in their national legislation in force at the time of signature of the present Act, shorter terms of protection than those provided for in the preceding paragraphs shall have the right to maintain such terms when ratifying or acceding to the present Act.

(8) In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.

ARTICLE 7*bis*

The provisions of the preceding Article shall also apply in the case of a work of joint authorship, provided that the terms measured from the death of the author shall be calculated from the death of the last surviving author.

ARTICLE 8

Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works.

ARTICLE 9

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

ARTICLE 10

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.
(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.
(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

ARTICLE 10*bis*

(1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.
(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

ARTICLE 11

(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:
  (i) the public performance of their works, including such public performance by any means or process;

(ii) any communication to the public of the performance of their works.

(2) Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

ARTICLE 11*bis*

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in paragraph (1) may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

(3) In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation.

ARTICLE 11*ter*

(1) Authors of literary works shall enjoy the exclusive right of authorizing:

(i) the public recitation of their works, including such public recitation by any means or process;

(ii) any communication to the public of the recitation of their works.

(2) Authors of literary works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

ARTICLE 12

Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.

ARTICLE 13

(1) Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

(2) Recordings of musical works made in a country of the Union in accordance with Article 13(3) of the Conventions signed at Rome on June 2, 1928, and at Brussels on June 26, 1948, may be reproduced in that country without the permission of the author of the musical work until a date two years after that country becomes bound by this Act.

(3) Recordings made in accordance with paragraph (1) and paragraph (2) of this Article and imported without permission from the parties concerned into a country where they are treated as infringing recordings shall be liable to seizure.

ARTICLE 14

(1) Authors of literary or artistic works shall have the exclusive right of authorizing:

(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works;

(ii) the public performance and communication to the public by wire of the works thus or reproduced.

(2) The adaptation into any other artistic form of a cinematographic production derived from literary or artistic works shall, without prejudice to the authorization of the author of the cinematographic production, remain subject to the authorization of the authors of the original works.

(3) The provisions of Article 13(1) shall not apply.

ARTICLE 14*bis*

(1) Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article.

(2) (a) Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed.

(b) However, in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work.

(c) The question whether or not the form of the undertaking referred to above should, for the application of the preceding subparagraph (b), be in a written agreement or a written act of the same effect shall be a matter for the legislation of the country where the maker of the cinematographic work has his headquarters or habitual residence. However, it shall be a matter for the legislation of the country of the Union where protection is claimed to provide that the said undertaking shall be in a written agreement or a written act of the same effect. The countries whose legislation so provides shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

(d) By "contrary or special stipulation" is meant any restrictive condition which is relevant to the aforesaid undertaking.

(3) Unless the national legislation provides to the contrary, the provisions of paragraph (2)(b) above shall not be applicable to authors of

scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof. However, those countries of the Union whose legislation does not contain rules providing for the application of the said paragraph (2)(b) to such director shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

ARTICLE 14*ter*

(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.
(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.
(3) The procedure for collection and the amounts shall be matters for determination by national legislation.

ARTICLE 15

(1) In order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner. This paragraph shall be applicable even if this name is a pseudonym, where the pseudonym adopted by the author leaves no doubt as to his identity.
(2) The person or body corporate whose name appears on a cinematographic work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the maker of the said work.
(3) In the case of anonymous and pseudonymous works, other than those referred to in paragraph (1) above, the publisher whose name appears on the work shall, in the absence of proof to the contrary, be deemed to represent the author, and in this capacity he shall be entitled to protect and enforce the author's rights. The provisions of this paragraph shall cease to apply when the author reveals his identity and establishes his claim to authorship of the work.

(4) (a) In the case of unpublished works where the identity of the author is un-known, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

ARTICLE 16

(1) Infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection.
(2) The provisions of the preceding paragraph shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected.
(3) The seizure shall take place in accordance with the legislation of each country.

ARTICLE 17

The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.

ARTICLE 18

(1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.
(2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the

country where protection is claimed, that work shall not be protected anew.

(3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.

(4) The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations.

ARTICLE 19

The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.

ARTICLE 20

The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.

ARTICLE 21

(1) Special provisions regarding developing countries are included in the Appendix.

(2) Subject to the provisions of Article 28(1)(b), the Appendix forms an integral part of this Act.

ARTICLE 22

(1) (a) The Union shall have an Assembly consisting of those countries of the Union which are bound by Article 22 to Article 26.

(b) The Government of each country shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(c) The expenses of each delegation shall be borne by the Government which has appointed it.

(2) (a) The Assembly shall:

(i) deal with all matters concerning the maintenance and development of the Union and the implementation of this Convention;

(ii) give directions concerning the preparation for conferences of revision to the International Bureau of Intellectual Property (hereinafter designated as "the International Bureau") referred to in the Convention Establishing the World Intellectual Property Organization (hereinafter designated as "the Organization"), due account being taken of any comments made by those countries of the Union which are not bound by Article 22 to Article 26;

(iii) review and approve the reports and activities of the Director General of the Organization concerning the Union, and give him all necessary instructions concerning matters within the competence of the Union;

(iv) elect the members of the Executive Committee of the Assembly;

(v) review and approve the reports and activities of its Executive Committee, and give instructions to such Committee;

(vi) determine the program and adopt the biennial budget of the Union, and approve its final accounts;

(vii) adopt the financial regulations of the Union;

(viii) establish such committees of experts and working groups as may be necessary for the work of the Union;

(ix) determine which countries not members of the Union and which inter-governmental and international non-governmental organizations shall be admitted to its meetings as observers;

(x) adopt amendments to Article 22 to Article 26;

(xi) take any other appropriate action designed to further the objectives of the Union;

(xii) exercise such other functions as are appropriate under this Convention;

(xiii) subject to its acceptance, exercise such rights as are given to it in the Convention establishing the Organization.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Assembly shall make its decisions after having heard the advice of the Coordination Committee of the Organization.

(3) (a) Each country member of the Assembly shall have one vote.

(b) One-half of the countries members of the Assembly shall constitute a quorum.

(c) Notwithstanding the provisions of subparagraph (b), if, in any session, the number of countries represented is less than one-half but equal to or more than one-third of the countries members of the Assembly, the Assembly may make decisions but, with the exception of decisions concerning its own procedure, all such decisions shall take effect only if the following conditions are fulfilled. The International Bureau shall communicate the said decisions to the countries members of the Assembly which were not represented and shall invite them to express in writing their vote or abstention within a period of three months from the date of the communication. If, at the expiration of this period, the number of countries having thus expressed their vote or abstention attains the number of countries which was lacking for attaining the quorum in the session itself, such decisions shall take effect provided that at the same time the required majority still obtains.

(d) Subject to the provisions of Article 26(2), the decisions of the Assembly shall require two-thirds of the votes cast.

(e) Abstentions shall not be considered as votes.

(f) A delegate may represent, and vote in the name of, one country only.

(g) Countries of the Union not members of the Assembly shall be admitted to its meetings as observers.

(4) (a) The Assembly shall meet once in every second calendar year in ordinary session upon convocation by the Director General and, in the absence of exceptional circumstances, during the same period and at the same place as the General Assembly of the Organization.

(b) The Assembly shall meet in extraordinary session upon convocation by the Director General, at the request of the Executive Committee or at the request of one-fourth of the countries members of the Assembly.

(5) The Assembly shall adopt its own rules of procedure.

ARTICLE 23

(1) The Assembly shall have an Executive Committee.

(2) (a) The Executive Committee shall consist of countries elected by the Assembly from among countries members of the Assembly. Furthermore, the country on whose territory the Organization has its headquarters shall, subject to the provisions of Article 25(7)(b), have an ex officio seat on the Committee.

(b) The Government of each country member of the Executive Committee shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(c) The expenses of each delegation shall be borne by the Government which has appointed it.

(3) The number of countries members of the Executive Committee shall correspond to one-fourth of the number of countries members of the Assembly. In establishing the number of seats to be filled, remainders after division by four shall be disregarded.

(4) In electing the members of the Executive Committee, the Assembly shall have due regard to an equitable geographical distribution and to the need for countries party to the Special Agreements which might be established in relation with the Union to be among the countries constituting the Executive Committee.

(5) (a) Each member of the Executive Committee shall serve from the close of the session of the Assembly which elected it to the close of the next ordinary session of the Assembly.

(b) Members of the Executive Committee may be re-elected, but not more than two-thirds of them.

(c) The Assembly shall establish the details of the rules governing the election and possible re-election of the members of the Executive Committee.

(6) (a) The Executive Committee shall:

(i) prepare the draft agenda of the Assembly;

(ii) submit proposals to the Assembly respecting the draft program and biennial budget of the Union prepared by the Director General;

(iii) [*Deleted*]

(iv) submit, with appropriate comments, to the Assembly the periodical reports of the Director General and the yearly audit reports on the accounts;

(v) in accordance with the decisions of the Assembly and having regard to circumstances arising between two ordinary sessions of the Assembly, take all necessary measures to ensure the execution of the program of the Union by the Director General;

(vi) perform such other functions as are allocated to it under this Convention.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Executive Committee shall make its decisions after having heard the advice of the Coordination Committee of the Organization.

(7) (a) The Executive Committee shall meet once a year in ordinary session upon convocation by the Director General, preferably during the same period and at the same place as the Coordination Committee of the Organization.

(b) The Executive Committee shall meet in extraordinary session upon convocation by the Director General, either on his own initiative, or at the request of its Chairman or one-fourth of its members.

(8) (a) Each country member of the Executive Committee shall have one vote.

(b) One-half of the members of the Executive Committee shall constitute a quorum.

(c) Decisions shall be made by a simple majority of the votes cast.

(d) Abstentions shall not be considered as votes.

(e) A delegate may represent, and vote in the name of, one country only.

(9) Countries of the Union not members of the Executive Committee shall be admitted to its meetings as observers.

(10) The Executive Committee shall adopt its own rules of procedure.

ARTICLE 24

(1) (a) The administrative tasks with respect to the Union shall be performed by the International Bureau, which is a continuation of the Bureau of the Union united with the Bureau of the Union established by the International Convention for the Protection of Industrial Property.

(b) In particular, the International Bureau shall provide the secretariat of the various organs of the Union.

(c) The Director General of the Organization shall be the chief executive of the Union and shall represent the Union.

(2) The International Bureau shall assemble and publish information concerning the protection of copyright. Each country of the Union shall promptly communicate to the International Bureau all new laws and official texts concerning the protection of copyright.

(3) The International Bureau shall publish a monthly periodical.

(4) The International Bureau shall, on request, furnish information to any country of the Union on matters concerning the protection of copyright.

(5) The International Bureau shall conduct studies, and shall provide services, designed to facilitate the protection of copyright.

(6) The Director General and any staff member designated by him shall participate, without the right to vote, in all meetings of the Assembly, the Executive Committee and any other committee of experts or working group. The Director General, or a staff member designated by him, shall be ex officio secretary of these bodies.

(7) (a) The International Bureau shall, in accordance with the directions of the Assembly and in cooperation with the Executive Committee,

make the preparations for the conferences of revision of the provisions of the Convention other than Article 22 to Article 26.

(b) The International Bureau may consult with intergovernmental and international non-governmental organizations concerning preparations for conferences of revision.

(c) The Director General and persons designated by him shall take part, without the right to vote, in the discussions at these conferences.

(8) The International Bureau shall carry out any other tasks assigned to it.

ARTICLE 25

(1) (a) The Union shall have a budget.

(b) The budget of the Union shall include the income and expenses proper to the Union, its contribution to the budget of expenses common to the Unions, and, where applicable, the sum made available to the budget of the Conference of the Organization.

(c) Expenses not attributable exclusively to the Union but also to one or more other Unions administered by the Organization shall be considered as expenses common to the Unions. The share of the Union in such common expenses shall be in proportion to the interest the Union has in them.

(2) The budget of the Union shall be established with due regard to the requirements of coordination with the budgets of the other Unions administered by the Organization.

(3) The budget of the Union shall be financed from the following sources:

(i) contributions of the countries of the Union;

(ii) fees and charges due for services performed by the International Bureau in relation to the Union;

(iii) sale of, or royalties on, the publications of the International Bureau concerning the Union;

(iv) gifts, bequests, and subventions;

(v) rents, interests, and other miscellaneous income.

(4) (a) For the purpose of establishing its contribution towards the budget, each country of the Union shall belong to a class, and shall pay its annual contributions on the basis of a number of units fixed as follows:

Class I 25
Class II 20
Class III 15
Class IV 10
Class V 5
Class VI 3
Class VII 1

(b) Unless it has already done so, each country shall indicate, concurrently with depositing its instrument of ratification or accession, the class to which it wishes to belong. Any country may change class. If it chooses a lower class, the country must announce it to the Assembly at one of its ordinary sessions. Any such change shall take effect at the beginning of the calendar year following the session.

(c) The annual contribution of each country shall be an amount in the same proportion to the total sum to be contributed to the annual budget of the Union by all countries as the number of its units is to the total of the units of all contributing countries.

(d) Contributions shall become due on the first of January of each year.

(e) A country which is in arrears in the payment of its contributions shall have no vote in any of the organs of the Union of which it is a member if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. However, any organ of the Union may allow such a country to continue to exercise its vote in that organ if, and as long as, it is satisfied that the delay in payment is due to exceptional and unavoidable circumstances.

(f) If the budget is not adopted before the beginning of a new financial period, it shall be at the same level as the budget of the previous year, in accordance with the financial regulations.

(5) The amount of the fees and charges due for services rendered by the International Bureau in relation to the Union shall be established, and shall be reported to the Assembly and the Executive Committee, by the Director General.

(6) (a) The Union shall have a working capital fund which shall be constituted by a single payment made by each country of the Union. If the fund becomes insufficient, an increase shall be decided by the Assembly.

(b) The amount of the initial payment of each country to the said fund or of its participation in the increase thereof shall be a proportion of the contribution of that country for the year in which the fund is established or the increase decided.

(c) The proportion and the terms of payment shall be fixed by the Assembly on the proposal of the Director General and after it has heard the advice of the Coordination Committee of the Organization.

(7) (a) In the headquarters agreement concluded with the country on the territory of which the Organization has its headquarters, it shall be provided that, whenever the working capital fund is insufficient,

such country shall grant advances. The amount of these advances and the conditions on which they are granted shall be the subject of separate agreements, in each case, between such country and the Organization. As long as it remains under the obligation to grant advances, such country shall have an ex officio seat on the Executive Committee.

(b) The country referred to in subparagraph (a) and the Organization shall each have the right to denounce the obligation to grant advances, by written notification. Denunciation shall take effect three years after the end of the year in which it has been notified.

(8) The auditing of the accounts shall be effected by one or more of the countries of the Union or by external auditors, as provided in the financial regulations. They shall be designated, with their agreement, by the Assembly.

ARTICLE 26

(1) Proposals for the amendment of Article 22, Article 23, Article 24, Article 25, and the present Article, may be initiated by any country member of the Assembly, by the Executive Committee, or by the Director General. Such proposals shall be communicated by the Director General to the member countries of the Assembly at least six months in advance of their consideration by the Assembly.

(2) Amendments to the Articles referred to in paragraph (1) shall be adopted by the Assembly. Adoption shall require three-fourths of the votes cast, provided that any amendment of Article 22, and of the present paragraph, shall require four-fifths of the votes cast.

(3) Any amendment to the Articles referred to in paragraph (1) shall enter into force one month after written notifications of acceptance, effected in accordance with their respective constitutional processes, have been received by the Director General from three-fourths of the countries members of the Assembly at the time it adopted the amendment. Any amendment to the said Articles thus accepted shall bind all the countries which are members of the Assembly at the time the amendment enters into force, or which become members thereof at a subsequent date, provided that any amendment increasing the financial obligations of countries of the Union shall bind only those countries which have notified their acceptance of such amendment.

ARTICLE 27

(1) This Convention shall be submitted to revision with a view to the introduction of amendments designed to improve the system of the Union.
(2) For this purpose, conferences shall be held successively in one of the countries of the Union among the delegates of the said countries.
(3) Subject to the provisions of Article 26 which apply to the amendment of Article 22 to Article 26, any revision of this Act, including the Appendix, shall require the unanimity of the votes cast.

ARTICLE 28

(1) (a) Any country of the Union which has signed this Act may ratify it, and, if it has not signed it, may accede to it. Instruments of ratification or accession shall be deposited with the Director General.
(b) Any country of the Union may declare in its instrument of ratification or accession that its ratification or accession shall not apply to Article 1 to Article 21 and the Appendix, provided that, if such country has previously made a declaration under Article VI(1) of the Appendix, then it may declare in the said instrument only that its ratification or accession shall not apply to Article 1 to Article 20.
(c) Any country of the Union which, in accordance with subparagraph (b), has excluded provisions therein referred to from the effects of its ratification or accession may at any later time declare that it extends the effects of its ratification or accession to those provisions. Such declaration shall be deposited with the Director General.
(2) (a) Article 1 to Article 21 and the Appendix shall enter into force three months after both of the following two conditions are fulfilled:
(i) at least five countries of the Union have ratified or acceded to this Act without making a declaration under paragraph (1)(b),
(ii) France, Spain, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, have become bound by the Universal Copyright Convention as revised at Paris on July 24, 1971.
(b) The entry into force referred to in subparagraph (a) shall apply to those countries of the Union which, at least three months before the said entry into force, have deposited instruments of ratification or accession not containing a declaration under paragraph (1)(b).

(c) With respect to any country of the Union not covered by subparagraph (b) and which ratifies or accedes to this Act without making a declaration under paragraph (1)(b), Article 1 to Article 21 and the Appendix shall enter into force three months after the date on which the Director General has notified the deposit of the relevant instrument of ratification or accession, unless a subsequent date has been indicated in the instrument deposited. In the latter case, Article 1 to Article 21 and the Appendix shall enter into force with respect to that country on the date thus indicated.

(d) The provisions of subparagraph (a) to subparagraph (c) do not affect the application of Article VI of the Appendix.

(3) With respect to any country of the Union which ratifies or accedes to this Act with or without a declaration made under paragraph (1)(b), Article 22 to Article 38 shall enter into force three months after the date on which the Director General has notified the deposit of the relevant instrument of ratification or accession, unless a subsequent date has been indicated in the instrument deposited. In the latter case, Article 22 to Article 38 shall enter into force with respect to that country on the date thus indicated.

ARTICLE 29

(1) Any country outside the Union may accede to this Act and thereby become party to this Convention and a member of the Union. Instruments of accession shall be deposited with the Director General.

(2) (a) Subject to subparagraph (b), this Convention shall enter into force with respect to any country outside the Union three months after the date on which the Director General has notified the deposit of its instrument of accession, unless a subsequent date has been indicated in the instrument deposited. In the latter case, this Convention shall enter into force with respect to that country on the date thus indicated.

(b) If the entry into force according to subparagraph (a) precedes the entry into force of Article 1 to Article 21 and the Appendix according to Article 28(2)(a), the said country shall, in the meantime, be bound, instead of by Article 1 to Article 21 and the Appendix, by Article 1 to Article 20 of the Brussels Act of this Convention.

ARTICLE 29*bis*

Ratification of or accession to this Act by any country not bound by Article 22 to Article 38 of the Stockholm Act of this Convention shall, for the sole purposes of Article 14(2) of the Convention establishing the Organization, amount to ratification of or accession to the said Stockholm Act with the limitation set forth in Article 28(1)(b)(i) thereof.

ARTICLE 30

(1) Subject to the exceptions permitted by paragraph (2) of this Article, by Article 28(1)(b), by Article 33(2), and by the Appendix, ratification or accession shall automatically entail acceptance of all the provisions and admission to all the advantages of this Convention.

(2) (a) Any country of the Union ratifying or acceding to this Act may, subject to Article V(2) of the Appendix, retain the benefit of the reservations it has previously formulated on condition that it makes a declaration to that effect at the time of the deposit of its instrument of ratification or accession.

(b) Any country outside the Union may declare, in acceding to this Convention and subject to Article V(2) of the Appendix, that it intends to substitute, temporarily at least, for Article 8 of this Act concerning the right of translation, the provisions of Article 5 of the Union Convention of 1886, as completed at Paris in 1896, on the clear understanding that the said provisions are applicable only to translations into a language in general use in the said country. Subject to Article I(6)(b) of the Appendix, any country has the right to apply, in relation to the right of translation of works whose country of origin is a country availing itself of such a reservation, a protection which is equivalent to the protection granted by the latter country.

(c) Any country may withdraw such reservations at any time by notification addressed to the Director General.

ARTICLE 31

(1) Any country may declare in its instrument of ratification or accession, or may inform the Director General by written notification at any time thereafter, that this Convention shall be applicable to all or part of those

territories, designated in the declaration or notification, for the external relations of which it is responsible.

(2) Any country which has made such a declaration or given such a notification may, at any time, notify the Director General that this Convention shall cease to be applicable to all or part of such territories.

(3) (a) Any declaration made under paragraph (1) shall take effect on the same date as the ratification or accession in which it was included, and any notification given under that paragraph shall take effect three months after its notification by the Director General.

(b) Any notification given under paragraph (2) shall take effect twelve months after its receipt by the Director General.

(4) This Article shall in no way be understood as implying the recognition or tacit acceptance by a country of the Union of the factual situation concerning a territory to which this Convention is made applicable by another country of the Union by virtue of a declaration under paragraph (1).

ARTICLE 32

(1) This Act shall, as regards relations between the countries of the Union, and to the extent that it applies, replace the Berne Convention of September 9, 1886, and the subsequent Acts of revision. The Acts previously in force shall continue to be applicable, in their entirety or to the extent that this Act does not replace them by virtue of the preceding sentence, in relations with countries of the Union which do not ratify or accede to this Act.

(2) Countries outside the Union which become party to this Act shall, subject to paragraph (3), apply it with respect to any country of the Union not bound by this Act or which, although bound by this Act, has made a declaration pursuant to Article 28(1)(b). Such countries recognize that the said country of the Union, in its relations with them:

(i) may apply the provisions of the most recent Act by which it is bound, and

(ii) subject to Article I(6) of the Appendix, has the right to adapt the protection to the level provided for by this Act.

(3) Any country which has availed itself of any of the faculties provided for in the Appendix may apply the provisions of the Appendix relating to the faculty or faculties of which it has availed itself in its relations with any other country of the Union which is not bound by this Act, provided that the latter country has accepted the application of the said provisions.

ARTICLE 33

(1) Any dispute between two or more countries of the Union concerning the interpretation or application of this Convention, not settled by negotiation, may, by any one of the countries concerned, be brought before the International Court of Justice by application in conformity with the Statute of the Court, unless the countries concerned agree on some other method of settlement. The country bringing the dispute before the Court shall inform the International Bureau; the International Bureau shall bring the matter to the attention of the other countries of the Union.
(2) Each country may, at the time it signs this Act or deposits its instrument of ratification or accession, declare that it does not consider itself bound by the provisions of paragraph (1). With regard to any dispute between such country and any other country of the Union, the provisions of paragraph (1) shall not apply.
(3) Any country having made a declaration in accordance with the provisions of paragraph (2) may, at any time, withdraw its declaration by notification addressed to the Director General.

ARTICLE 34

(1) Subject to Article 29*bis*, no country may ratify or accede to earlier Acts of this Convention once Article 1 to Article 21 and the Appendix have entered into force.
(2) Once Article 1 to Article 21 and the Appendix have entered into force, no country may make a declaration under Article 5 of the Protocol Regarding Developing Countries attached to the Stockholm Act.

ARTICLE 35

(1) This Convention shall remain in force without limitation as to time.
(2) Any country may denounce this Act by notification addressed to the Director General. Such denunciation shall constitute also denunciation of all earlier Acts and shall affect only the country making it, the Convention remaining in full force and effect as regards the other countries of the Union.
(3) Denunciation shall take effect one year after the day on which the Director General has received the notification.

(4) The right of denunciation provided by this Article shall not be exercised by any country before the expiration of five years from the date upon which it becomes a member of the Union.

ARTICLE 36

(1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.
(2) It is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention.

ARTICLE 37

(1) (a) This Act shall be signed in a single copy in the French and English languages and, subject to paragraph (2), shall be deposited with the Director General.
(b) Official texts shall be established by the Director General, after consultation with the interested Governments, in the Arabic, German, Italian, Portuguese and Spanish languages, and such other languages as the Assembly may designate.
(c) In case of differences of opinion on the interpretation of the various texts, the French text shall prevail.
(2) This Act shall remain open for signature until January 31, 1972. Until that date, the copy referred to in paragraph (1)(a) shall be deposited with the Government of the French Republic.
(3) The Director General shall certify and transmit two copies of the signed text of this Act to the Governments of all countries of the Union and, on request, to the Government of any other country.
(4) The Director General shall register this Act with the Secretariat of the United Nations.
(5) The Director General shall notify the Governments of all countries of the Union of signatures, deposits of instruments of ratification or accession and any declarations included in such instruments or made pursuant to Article 28(1)(c), Article 30(2)(a) and Article 30(2)(b), and Article 33(2), entry into force of any provisions of this Act, notifications of denunciation, and notifications pursuant to Article 30(2)(c), Article 31(1) and Article 31(2), Article 33(3), and Article 38(1), as well as the Appendix.

ARTICLE 38

(1) Countries of the Union which have not ratified or acceded to this Act and which are not bound by Article 22 to Article 26 of the Stockholm Act of this Convention may, until April 26, 1975, exercise, if they so desire, the rights provided under the said Articles as if they were bound by them. Any country desiring to exercise such rights shall give written notification to this effect to the Director General; this notification shall be effective on the date of its receipt. Such countries shall be deemed to be members of the Assembly until the said date.
(2) As long as all the countries of the Union have not become Members of the Organization, the International Bureau of the Organization shall also function as the Bureau of the Union, and the Director General as the Director of the said Bureau.
(3) Once all the countries of the Union have become Members of the Organization, the rights, obligations, and property, of the Bureau of the Union shall devolve on the International Bureau of the Organization.

Appendix: Special Provisions Regarding Developing Countries

ARTICLE I

(1) Any country regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations which ratifies or accedes to this Act, of which this Appendix forms an integral part, and which, having regard to its economic situation and its social or cultural needs, does not consider itself immediately in a position to make provision for the protection of all the rights as provided for in this Act, may, by a notification deposited with the Director General at the time of depositing its instrument of ratification or accession or, subject to Article V(1)(c), at any time thereafter, declare that it will avail itself of the faculty provided for in Article II, or of the faculty provided for in Article III, or of both of those faculties. It may, instead of availing itself of the faculty provided for in Article II, make a declaration according to Article V(1)(a).
(2) (a) Any declaration under paragraph (1) notified before the expiration of the period of ten years from the entry into force of Article 1 to Article 21 and this Appendix according to Article 28(2) shall be

effective until the expiration of the said period. Any such declaration may be renewed in whole or in part for periods of ten years each by a notification deposited with the Director General not more than fifteen months and not less than three months before the expiration of the ten-year period then running.

(b) Any declaration under paragraph (1) notified after the expiration of the period of ten years from the entry into force of Article 1 to Article 21 and this Appendix according to Article 28(2) shall be effective until the expiration of the ten-year period then running. Any such declaration may be renewed as provided for in the second sentence of subparagraph (a).

(3) Any country of the Union which has ceased to be regarded as a developing country as referred to in paragraph (1) shall no longer be entitled to renew its declaration as provided in paragraph (2), and, whether or not it formally withdraws its declaration, such country shall be precluded from availing itself of the faculties referred to in paragraph (1) from the expiration of the ten-year period then running or from the expiration of a period of three years after it has ceased to be regarded as a developing country, whichever period expires later.

(4) Where, at the time when the declaration made under paragraph (1) or paragraph (2) ceases to be effective, there are copies in stock which were made under a license granted by virtue of this Appendix, such copies may continue to be distributed until their stock is exhausted.

(5) Any country which is bound by the provisions of this Act and which has deposited a declaration or a notification in accordance with Article 31(1) with respect to the application of this Act to a particular territory, the situation of which can be regarded as analogous to that of the countries referred to in paragraph (1), may, in respect of such territory, make the declaration referred to in paragraph (1) and the notification of renewal referred to in paragraph (2). As long as such declaration or notification remains in effect, the provisions of this Appendix shall be applicable to the territory in respect of which it was made.

(6) (a) The fact that a country avails itself of any of the faculties referred to in paragraph (1) does not permit another country to give less protection to works of which the country of origin is the former country than it is obliged to grant under Article 1 to Article 20.

(b) The right to apply reciprocal treatment provided for in Article 30(2)(b), second sentence, shall not, until the date on which the period applicable under Article I(3) expires, be exercised in respect of works the country of origin of which is a country which has made a declaration according to Article V(1)(a).

ARTICLE II

(1) Any country which has declared that it will avail itself of the faculty provided for in this Article shall be entitled, so far as works published in printed or analogous forms of reproduction are concerned, to substitute for the exclusive right of translation provided for in Article 8 a system of non-exclusive and non-transferable licenses, granted by the competent authority under the following conditions and subject to Article IV.

(2) (a) Subject to paragraph (3), if, after the expiration of a period of three years, or of any longer period determined by the national legislation of the said country, commencing on the date of the first publication of the work, a translation of such work has not been published in a language in general use in that country by the owner of the right of translation, or with his authorization, any national of such country may obtain a license to make a translation of the work in the said language and publish the translation in printed or analogous forms of reproduction.

(b) A license under the conditions provided for in this Article may also be granted if all the editions of the translation published in the language concerned are out of print.

(3) (a) In the case of translations into a language which is not in general use in one or more developed countries which are members of the Union, a period of one year shall be substituted for the period of three years referred to in paragraph (2)(a).

(b) Any country referred to in paragraph (1) may, with the unanimous agreement of the developed countries which are members of the Union and in which the same language is in general use, substitute, in the case of translations into that language, for the period of three years referred to in paragraph (2)(a) a shorter period as determined by such agreement but not less than one year. However, the provisions of the foregoing sentence shall not apply where the language in question is English, French or Spanish. The Director General shall be notified of any such agreement by the Governments which have concluded it.

(4) (a) No license obtainable after three years shall be granted under this Article until a further period of six months has elapsed, and no license obtainable after one year shall be granted under this Article until a further period of nine months has elapsed

(i) from the date on which the applicant complies with the requirements mentioned in Article IV(1), or

(ii) where the identity or the address of the owner of the right of translation is unknown, from the date on which the applicant

sends, as provided for in Article IV(2), copies of his application submitted to the authority competent to grant the license.

(b) If, during the said period of six or nine months, a translation in the language in respect of which the application was made is published by the owner of the right of translation or with his authorization, no license under this Article shall be granted.

(5) Any license under this Article shall be granted only for the purpose of teaching, scholarship or research.

(6) If a translation of a work is published by the owner of the right of translation or with his authorization at a price reasonably related to that normally charged in the country for comparable works, any license granted under this Article shall terminate if such translation is in the same language and with substantially the same content as the translation published under the license. Any copies already made before the license terminates may continue to be distributed until their stock is exhausted.

(7) For works which are composed mainly of illustrations, a license to make and publish a translation of the text and to reproduce and publish the illustrations may be granted only if the conditions of Article III are also fulfilled.

(8) No license shall be granted under this Article when the author has withdrawn from circulation all copies of his work.

(9) (a) A license to make a translation of a work which has been published in printed or analogous forms of reproduction may also be granted to any broadcasting organization having its headquarters in a country referred to in paragraph (1), upon an application made to the competent authority of that country by the said organization, provided that all of the following conditions are met:

(i) the translation is made from a copy made and acquired in accordance with the laws of the said country;

(ii) the translation is only for use in broadcasts intended exclusively for teaching or for the dissemination of the results of specialized technical or scientific research to experts in a particular profession;

(iii) the translation is used exclusively for the purposes referred to in condition (ii) through broadcasts made lawfully and intended for recipients on the territory of the said country, including broadcasts made through the medium of sound or visual recordings lawfully and exclusively made for the purpose of such broadcasts;

(iv) all uses made of the translation are without any commercial purpose.

(b) Sound or visual recordings of a translation which was made by a broadcasting organization under a license granted by virtue of this

paragraph may, for the purposes and subject to the conditions referred to in subparagraph (a) and with the agreement of that organization, also be used by any other broadcasting organization having its headquarters in the country whose competent authority granted the license in question.

(c) Provided that all of the criteria and conditions set out in subparagraph (a) are met, a license may also be granted to a broadcasting organization to translate any text incorporated in an audio-visual fixation where such fixation was itself prepared and published for the sole purpose of being used in connection with systematic instructional activities.

(d) Subject to subparagraph (a) to subparagraph (c), the provisions of the preceding paragraphs shall apply to the grant and exercise of any license granted under this paragraph.

ARTICLE III

(1) Any country which has declared that it will avail itself of the faculty provided for in this Article shall be entitled to substitute for the exclusive right of reproduction provided for in Article 9 a system of non-exclusive and non-transferable licenses, granted by the competent authority under the following conditions and subject to Article IV.

(2) (a) If, in relation to a work to which this Article applies by virtue of paragraph (7), after the expiration of

(i) the relevant period specified in paragraph (3), commencing on the date of first publication of a particular edition of the work, or

(ii) any longer period determined by national legislation of the country referred to in paragraph (1), commencing on the same date,

copies of such edition have not been distributed in that country to the general public or in connection with systematic instructional activities, by the owner of the right of reproduction or with his authorization, at a price reasonably related to that normally charged in the country for comparable works, any national of such country may obtain a license to reproduce and publish such edition at that or a lower price for use in connection with systematic instructional activities.

(b) A license to reproduce and publish an edition which has been distributed as described in subparagraph may also be granted under the conditions provided for in this Article if, after the expiration of the applicable period, no authorized copies of that edition have been on sale for a period of six months in the country concerned to the general public or in connection with systematic instructional

activities at a price reasonably related to that normally charged in the country for comparable works.

(3) The period referred to in paragraph (2)(a)(i) shall be five years, except that

(i) for works of the natural and physical sciences, including mathematics, and of technology, the period shall be three years;

(ii) for works of fiction, poetry, drama and music, and for art books, the period shall be seven years.

(4) (a) No license obtainable after three years shall be granted under this Article until a period of six months has elapsed

(i) from the date on which the applicant complies with the requirements mentioned in Article IV(1), or

(ii) where the identity or the address of the owner of the right of reproduction is unknown, from the date on which the applicant sends, as provided for in Article IV(2), copies of his application submitted to the authority competent to grant the license.

(b) Where licenses are obtainable after other periods and Article IV(2) is applicable, no license shall be granted until a period of three months has elapsed from the date of the dispatch of the copies of the application.

(c) If, during the period of six or three months referred to in subparagraph (a) and subparagraph (b), a distribution as described in paragraph (2)(a) has taken place, no license shall be granted under this Article.

(d) No license shall be granted if the author has withdrawn from circulation all copies of the edition for the reproduction and publication of which the license has been applied for.

(5) A license to reproduce and publish a translation of a work shall not be granted under this Article in the following cases:

(i) where the translation was not published by the owner of the right of translation or with his authorization, or

(ii) where the translation is not in a language in general use in the country in which the license is applied for.

(6) If copies of an edition of a work are distributed in the country referred to in paragraph (1) to the general public or in connection with systematic instructional activities, by the owner of the right of reproduction or with his authorization, at a price reasonably related to that normally charged in the country for comparable works, any license granted under this Article shall terminate if such edition is in the same language and with substantially the same content as the edition which was published under the said license. Any copies already made before the license terminates may continue to be distributed until their stock is exhausted.

(7) (a) Subject to subparagraph (b), the works to which this Article applies shall be limited to works published in printed or analogous forms of reproduction.

(b) This Article shall also apply to the reproduction in audio-visual form of lawfully made audio-visual fixations including any protected works incorporated therein and to the translation of any incorporated text into a language in general use in the country in which the license is applied for, always provided that the audiovisual fixations in question were prepared and published for the sole purpose of being used in connection with systematic instructional activities.

ARTICLE IV

(1) A license under Article II or Article III may be granted only if the applicant, in accordance with the procedure of the country concerned, establishes either that he has requested, and has been denied, authorization by the owner of the right to make and publish the translation or to reproduce and publish the edition, as the case may be, or that, after due diligence on his part, he was unable to find the owner of the right. At the same time as making the request, the applicant shall inform any national or international information center referred to in paragraph (2).

(2) If the owner of the right cannot be found, the applicant for a license shall send, by registered airmail, copies of his application, submitted to the authority competent to grant the license, to the publisher whose name appears on the work and to any national or international information center which may have been designated, in a notification to that effect deposited with the Director General, by the Government of the country in which the publisher is believed to have his principal place of business.

(3) The name of the author shall be indicated on all copies of the translation or reproduction published under a license granted under Article II or Article III. The title of the work shall appear on all such copies. In the case of a translation, the original title of the work shall appear in any case on all the said copies.

(4) (a) No license granted under Article II or Article III shall extend to the export of copies, and any such license shall be valid only for

publication of the translation or of the reproduction, as the case may be, in the territory of the country in which it has been applied for.

(b) For the purposes of subparagraph (a), the notion of export shall include the sending of copies from any territory to the country which, in respect of that territory, has made a declaration under Article I(5).

(c) Where a governmental or other public entity of a country which has granted a license to make a translation under Article II into a language other than English, French or Spanish sends copies of a translation published under such license to another country, such sending of copies shall not, for the purposes of subparagraph (a), be considered to constitute export if all of the following conditions are met:

(i) the recipients are individuals who are nationals of the country whose competent authority has granted the license, or organizations grouping such individuals;

(ii) the copies are to be used only for the purpose of teaching, scholarship or research;

(iii) the sending of the copies and their subsequent distribution to recipients is without any commercial purpose; and

(iv) the country to which the copies have been sent has agreed with the country whose competent authority has granted the license to allow the receipt, or distribution, or both, and the Director General has been notified of the agreement by the Government of the country in which the license has been granted.

(5) All copies published under a license granted by virtue of Article II or Article III shall bear a notice in the appropriate language stating that the copies are available for distribution only in the country or territory to which the said license applies.

(6) (a) Due provision shall be made at the national level to ensure

(i) that the license provides, in favour of the owner of the right of translation or of reproduction, as the case may be, for just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned, and

(ii) payment and transmittal of the compensation: should national currency regulations intervene, the competent authority shall make all efforts, by the use of international machinery, to ensure transmittal in internationally convertible currency or its equivalent.

(b) Due provision shall be made by national legislation to ensure a correct translation of the work, or an accurate reproduction of the particular edition, as the case may be.

ARTICLE V

(1) (a) Any country entitled to make a declaration that it will avail itself of the faculty provided for in Article II may, instead, at the time of ratifying or acceding to this Act:
  (i) if it is a country to which Article 30(2)(a) applies, make a declaration under that provision as far as the right of translation is concerned;
  (ii) if it is a country to which Article 30(2)(a) does not apply, and even if it is not a country outside the Union, make a declaration as provided for in Article 30(2)(b), first sentence.
  (b) In the case of a country which ceases to be regarded as a developing country as referred to in Article I(1), a declaration made according to this paragraph shall be effective until the date on which the period applicable under Article I(3) expires.
  (c) Any country which has made a declaration according to this paragraph may not subsequently avail itself of the faculty provided for in Article II even if it withdraws the said declaration.

(2) Subject to paragraph (3), any country which has availed itself of the faculty provided for in Article II may not subsequently make a declaration according to paragraph (1).

(3) Any country which has ceased to be regarded as a developing country as referred to in Article I(1) may, not later than two years prior to the expiration of the period applicable under Article I(3), make a declaration to the effect provided for in Article 30(2)(b), first sentence, notwithstanding the fact that it is not a country outside the Union. Such declaration shall take effect at the date on which the period applicable under Article I(3) expires.

ARTICLE VI

(1) Any country of the Union may declare, as from the date of this Act, and at any time before becoming bound by Article 1 to Article 21 and this Appendix:
  (i) if it is a country which, were it bound by Article 1 to Article 21 and this Appendix, would be entitled to avail itself of the faculties referred to in Article I(1), that it will apply the provisions of Article II or of Article III or of both to works whose country of origin is a country which, pursuant to (ii) below, admits the application of those Articles to such works, or which is bound by Article 1 to

Article 21 and this Appendix; such declaration may, instead of referring to Article II, refer to Article V;

(ii) that it admits the application of this Appendix to works of which it is the country of origin by countries which have made a declaration under (i) above or a notification under Article I.

(2) Any declaration made under paragraph (1) shall be in writing and shall be deposited with the Director General. The declaration shall become effective from the date of its deposit.

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APPENDIX

2

Berne Convention, Contracting Parties*

Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Albania	Berne Convention	In Force	March 6, 1994
Algeria	Berne Convention	In Force	April 19, 1998
Andorra	Berne Convention	In Force	June 2, 2004
Antigua and Barbuda	Berne Convention	In Force	March 17,2000
Argentina	Berne Convention	In Force	June 10, 1967
Armenia	Berne Convention	In Force	October 19, 2000
Australia	Berne Convention	In Force	April 14, 1928
Austria	Berne Convention	In Force	October 1, 1920
Azerbaijan	Berne Convention	In Force	June 4, 1999
Bahamas	Berne Convention	In Force	July 10, 1973
Bahrain	Berne Convention	In Force	March 2, 1997
Bangladesh	Berne Convention	In Force	May 4, 1999
Barbados	Berne Convention	In Force	July 30, 1983
Belarus	Berne Convention	In Force	December 12, 1997
Belgium	Berne Convention	In Force	December 5, 1887
Belize	Berne Convention	In Force	June 17,2000
Benin	Berne Convention	In Force	January 3, 1961
Bhutan	Berne Convention	in Force	November 25, 2004
Bolivia (Plurinational State of)	Berne Convention	In Force	November 4, 1993
Bosnia and Herzegovina	Berne Convention	In Force	March 1, 1992
Botswana	Berne Convention	In Force	April 15, 1998

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Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Brazil	Berne Convention	In Force	February 9, 1922
Brunei Darussalam	Berne Convention	In Force	August 30, 2006
Bulgaria	Berne Convention	In Force	December 5, 1921
Burkina Faso	Berne Convention	In Force	August 19, 1963
Cameroon	Berne Convention	In Force	September 21, 1964
Canada	Berne Convention	In Force	April 10, 1928
Cape Verde	Berne Convention	In Force	July 7, 1997
Central African Republic	Berne Convention	In Force	September 3, 1977
Chad	Berne Convention	In Force	November 25, 1971
Chile	Berne Convention	In Force	June 5, 1970
China	Berne Convention	In Force	October 15, 1992
Colombia	Berne Convention	In Force	March 7, 1988
Comoros	Berne Convention	In Force	April 17,2005
Congo	Berne Convention	In Force	May 8, 1962
Costa Rica	Berne Convention	In Force	June 10, 1978
Côte d'Ivoire	Berne Convention	In Force	January 1, 1962
Croatia	Berne Convention	In Force	October 8, 1991
Cuba	Berne Convention	In Force	February 20, 1997
Cyprus	Berne Convention	In Force	February 24, 1964
Czech Republic	Berne Convention	In Force	January 1, 1993
Democratic People's Republic of Korea	Berne Convention	In Force	April 28, 2003
Democratic Republic of the Congo	Berne Convention	In Force	October 8, 1963
Denmark	Berne Convention	In Force	July 1, 1903
Djibouti	Berne Convention	In Force	May 13, 2002
Dominica	Berne Convention	In Force	August 7, 1999
Dominican Republic	Berne Convention	In Force	December 24, 1997
Ecuador	Berne Convention	In Force	October 9, 1991
Egypt	Berne Convention	In Force	June 7, 1977
El Salvador	Berne Convention	In Force	February 19, 1994

Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Equatorial Guinea	Berne Convention	In Force	June 26, 1997
Estonia	Berne Convention	In Force	October 26, 1994
Fiji	Berne Convention	In Force	December 1, 1971
Finland	Berne Convention	In Force	April 1, 1928
France	Berne Convention	In Force	December 5, 1887
Gabon	Berne Convention	In Force	March 26, 1962
Gambia	Berne Convention	In Force	March 7, 1993
Georgia	Berne Convention	In Force	May 16, 1995
Germany	Berne Convention	In Force	December 5, 1887
Ghana	Berne Convention	In Force	October 11, 1991
Greece	Berne Convention	In Force	November 9, 1920
Grenada	Berne Convention	In Force	September 22, 1998
Guatemala	Berne Convention	In Force	July 28, 1997
Guinea	Berne Convention	In Force	November 20, 1980
Guinea-Bissau	Berne Convention	In Force	July 22, 1991
Guyana	Berne Convention	In Force	October 25, 1994
Haiti	Berne Convention	In Force	January 11, 1996
Holy See	Berne Convention	In Force	September 12, 1935
Honduras	Berne Convention	In Force	January 25, 1990
Hungary	Berne Convention	In Force	February 14, 1922
Iceland	Berne Convention	In Force	September 7, 1947
India	Berne Convention	In Force	April 1, 1928
Indonesia	Berne Convention	In Force	September 5, 1997
Ireland	Berne Convention	In Force	October 5, 1927
Israel	Berne Convention	In Force	March 24, 1950
Italy	Berne Convention	In Force	December 5, 1887
Jamaica	Berne Convention	In Force	January 1, 1994

Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Japan	Berne Convention	In Force	July 15, 1899
Jordan	Berne Convention	In Force	July 28, 1999
Kazakhstan	Berne Convention	In Force	April 12, 1999
Kenya	Berne Convention	In Force	June 11, 1993
Kyrgyzstan	Berne Convention	In Force	July 8, 1999
Latvia	Berne Convention	In Force	August 11, 1995
Lebanon	Berne Convention	In Force	September 30, 1947
Lesotho	Berne Convention	In Force	September 28, 1989
Liberia	Berne Convention	In Force	March 8, 1989
Libyan Arab Jamahiriya	Berne Convention	In Force	September 28, 1976
Liechtenstein	Berne Convention	In Force	July 30, 1931
Lithuania	Berne Convention	In Force	December 14, 1994
Luxembourg	Berne Convention	In Force	June 20, 1888
Madagascar	Berne Convention	In Force	January 1, 1966
Malawi	Berne Convention	In Force	October 12, 1991
Malaysia	Berne Convention	In Force	October 1, 1990
Mali	Berne Convention	In Force	March 19, 1962
Malta	Berne Convention	In Force	September 21, 1964
Mauritania	Berne Convention	In Force	February 6, 1973
Mauritius	Berne Convention	In Force	May 10, 1989
Mexico	Berne Convention	In Force	June 11, 1967
Micronesia (Federated States of)	Berne Convention	In Force	October 7, 2003
Monaco	Berne Convention	In Force	May 30, 1889
Mongolia	Berne Convention	In Force	March 12, 1998
Montenegro	Berne Convention	In Force	June 3, 2006
Morocco	Berne Convention	In Force	June 16, 1917
Namibia	Berne Convention	In Force	March 21, 1990
Nepal	Berne Convention	In Force	January 11,2006
Netherlands	Berne Convention	In Force	November 1, 1912
New Zealand	Berne Convention	In Force	April 24, 1928
Nicaragua	Berne Convention	In Force	August 23, 2000
Niger	Berne Convention	In Force	May 2, 1962

Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Nigeria	Berne Convention	In Force	September 14, 1993
Norway	Berne Convention	In Force	April 13, 1896
Oman	Berne Convention	In Force	July 14, 1999
Pakistan	Berne Convention	In Force	July 5, 1948
Panama	Berne Convention	In Force	June 8, 1996
Paraguay	Berne Convention	In Force	January 2, 1992
Peru	Berne Convention	In Force	August 20, 1988
Philippines	Berne Convention	In Force	August 1, 1951
Poland	Berne Convention	In Force	January 28, 1920
Portugal	Berne Convention	In Force	March 29, 1911
Qatar	Berne Convention	In Force	July 5, 2000
Republic of Korea	Berne Convention	In Force	August 21, 1996
Republic of Moldova	Berne Convention	In Force	November 2, 1995
Romania	Berne Convention	In Force	January 1, 1927
Russian Federation	Berne Convention	In Force	March 13, 1995
Rwanda	Berne Convention	In Force	March 1, 1984
Saint Kitts and Nevis	Berne Convention	In Force	April 9, 1995
Saint Lucia	Berne Convention	In Force	August 24, 1993
Saint Vincent and the Grenadines	Berne Convention	In Force	August 29, 1995
Samoa	Berne Convention	In Force	July 21, 2006
Saudi Arabia	Berne Convention	In Force	March 11, 2004
Senegal	Berne Convention	In Force	August 25, 1962
Serbia	Berne Convention	In Force	April 27, 1992
Singapore	Berne Convention	In Force	December 21, 1998
Slovakia	Berne Convention	In Force	January 1, 1993
Slovenia	Berne Convention	In Force	June 25, 1991
South Africa	Berne Convention	In Force	October 3, 1928
Spain	Berne Convention	In Force	December 5, 1887
Sri Lanka	Berne Convention	In Force	July 20, 1959
Sudan	Berne Convention	In Force	December 28, 2000
Suriname	Berne Convention	In Force	February 23, 1977
Swaziland	Berne Convention	In Force	December 14, 1998

Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Sweden	Berne Convention	In Force	August 1, 1904
Switzerland	Berne Convention	In Force	December 5, 1887
Syrian Arab Republic	Berne Convention	In Force	June 11, 2004
Tajikistan	Berne Convention	In Force	March 9, 2000
Thailand	Berne Convention	In Force	July 17, 1931
The former Yugoslav Republic of Macedonia	Berne Convention	In Force	September 8, 1991
Togo	Berne Convention	In Force	April 30, 1975
Tonga	Berne Convention	In Force	June 14,2001
Trinidad and Tobago	Berne Convention	In Force	August 16, 1988
Tunisia	Berne Convention	In Force	December 5, 1887
Turkey	Berne Convention	In Force	January 1, 1952
Ukraine	Berne Convention	In Force	October 25, 1995
United Arab Emirates	Berne Convention	In Force	July 14, 2004
United Kingdom	Berne Convention	In Force	December 5, 1887
United Republic of Tanzania	Berne Convention	In Force	July 25, 1994
United States of America	Berne Convention	In Force	March 1, 1989
Uruguay	Berne Convention	In Force	July 10, 1967
Uzbekistan	Berne Convention	In Force	April 19, 2005
Venezuela (Bolivarian Republic of)	Berne Convention	In Force	December 30, 1982
Viet Nam	Berne Convention	In Force	October 26, 2004
Yemen	Berne Convention	In Force	July 14, 2008
Zambia	Berne Convention	In Force	January 2, 1992
Zimbabwe	Berne Convention	In Force	April 18, 1980

APPENDIX
3

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations [Rome Convention]

[Done at Rome on October 26, 1961]
The Contracting States, moved by the desire to protect the rights of performers, producers of phonograms, and broadcasting organisations,
Have agreed as follows:

ARTICLE 1

Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.

ARTICLE 2

1. For the purposes of this Convention, national treatment shall mean the treatment accorded by the domestic law of the Contracting State in which protection is claimed:
   (a) to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory;
   (b) to producers of phonograms who are its nationals, as regards phonograms first fixed or first published on its territory;
   (c) to broadcasting organisations which have their headquarters on its territory, as regards broadcasts transmitted from transmitters situated on its territory.

2. National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention.

ARTICLE 3

For the purposes of this Convention:

(a) "performers" means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works;

(b) "phonogram" means any exclusively aural fixation of sounds of a performance or of other sounds;

(c) "producer of phonograms" means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds;

(d) "publication" means the offering of copies of a phonogram to the public in reasonable quantity;

(e) "reproduction" means the making of a copy or copies of a fixation;

(f) "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds;

(g) "rebroadcasting" means the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation.

ARTICLE 4

Each Contracting State shall grant national treatment to performers if any of the following conditions is met:

(a) the performance takes place in another Contracting State;

(b) the performance is incorporated in a phonogram which is protected under Article 5 of this Convention;

(c) the performance, not being fixed on a phonogram, is carried by a broadcast which is protected by Article 6 of this Convention.

ARTICLE 5

1. Each Contracting State shall grant national treatment to producers of phonograms if any of the following conditions is met:
   (a) the producer of the phonogram is a national of another Contracting State (criterion of nationality);

(b) the first fixation of the sound was made in another Contracting State (criterion of fixation);

(c) the phonogram was first published in another Contracting State (criterion of publication).

(2) If a phonogram was first published in a non-contracting State but if it was also published, within thirty days of its first publication, in a Contracting State (simultaneous publication), it shall be considered as first published in the Contracting State.

(3) By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare that it will not apply the criterion of publication or, alternatively, the criterion of fixation. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.

ARTICLE 6

1. Each Contracting State shall grant national treatment to broadcasting organisations if either of the following conditions is met:
   (a) the headquarters of the broadcasting organisation is situated in another Contracting State;
   (b) the broadcast was transmitted from a transmitter situated in another Contracting State.
2. By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare that it will protect broadcasts only if the headquarters of the broadcasting organisation is situated in another Contracting State and the broadcast was transmitted from a transmitter situated in the same Contracting State. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.

ARTICLE 7

1. The protection provided for performers by this Convention shall include the possibility of preventing:
   (a) the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation;
   (b) the fixation, without their consent, of their unfixed performance;

(c) the reproduction, without their consent, of a fixation of their performance:

(i) if the original fixation itself was made without their consent;

(ii) if the reproduction is made for purposes different from those for which the performers gave their consent;

(iii) if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions.

2. (1) If broadcasting was consented to by the performers, it shall be a matter for the domestic law of the Contracting State where protection is claimed to regulate the protection against rebroadcasting, fixation for broadcasting purposes and the reproduction of such fixation for broadcasting purposes.

(2) The terms and conditions governing the use by broadcasting organisations of fixations made for broadcasting purposes shall be determined in accordance with the domestic law of the Contracting State where protection is claimed.

(3) However, the domestic law referred to in sub-paragraphs (1) and (2) of this paragraph shall not operate to deprive performers of the ability to control, by contract, their relations with broadcasting organisations.

ARTICLE 8

Any Contracting State may, by its domestic laws and regulations, specify the manner in which performers will be represented in connexion with the exercise of their rights if several of them participate in the same performance.

ARTICLE 9

Any Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary or artistic works.

ARTICLE 10

Producers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms.

ARTICLE 11

If, as a condition of protecting the rights of producers of phonograms, or of performers, or both, in relation to phonograms, a Contracting State, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled if all the copies in commerce of the published phonogram or their containers bear a notice consisting of the symbol (P), accompanied by the year date of the first publication, placed in such a manner as to give reasonable notice of claim of protection; and if the copies or their containers do not identify the producer or the licensee of the producer (by carrying his name, trade mark or other appropriate designation), the notice shall also include the name of the owner of the rights of the producer; and, furthermore, if the copies or their containers do not identify the principal performers, the notice shall also include the name of the person who, in the country in which the fixation was effected, owns the rights of such performers.

ARTICLE 12

If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

ARTICLE 13

Broadcasting organisations shall enjoy the right to authorise or prohibit:

(a) the rebroadcasting of their broadcasts;
(b) the fixation of their broadcasts;
(c) the reproduction:
  (i) of fixations, made without their consent, of their broadcasts;
  (ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;
(d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

ARTICLE 14

The term of protection to be granted under this Convention shall last at least until the end of a period of twenty years computed from the end of the year in which:

(a) the fixation was made—for phonograms and for performances incorporated therein;
(b) the performance took place—for performances not incorporated in phonograms;
(c) the broadcast took place—for broadcasts.

ARTICLE 15

1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:
   (a) private use;
   (b) use of short excerpts in connexion with the reporting of current events;
   (c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;
   (d) use solely for the purposes of teaching or scientific research.
2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connexion with the protection of copyright in literary and artistic works. However, compulsory licenses may be provided for only to the extent to which they are compatible with this Convention.

ARTICLE 16

1. Any State, upon becoming party to this Convention, shall be bound by all the obligations and shall enjoy all the benefits thereof. However, a State may at any time, in a notification deposited with the Secretary-General of the United Nations, declare that:
   (a) as regards Article 12:
      (i) it will not apply the provisions of that Article;

(ii) it will not apply the provisions of that Article in respect of certain uses;

(iii) as regards phonograms the producer of which is not a national of another Contracting State, it will not apply that Article;

(iv) as regards phonograms the producer of which is a national of another Contracting State, it will limit the protection provided for by that Article to the extent to which, and to the term for which, the latter State grants protection to phonograms first fixed by a national of the State making the declaration; however, the fact that the Contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the State making the declaration shall not be considered as a difference in the extent of the protection;

(b) as regards Article 13, it will not apply item 13(d); if a Contracting State makes such a declaration, the other Contracting States shall not be obliged to grant the right referred to in Article 13(d), to broadcasting organisations whose headquarters are in that State.

2. If the notification referred to in paragraph 1 of this Article is made after the date of the deposit of the instrument of ratification, acceptance or accession, the declaration will become effective six months after it has been deposited.

ARTICLE 17

Any State which, on October 26, 1961, grants protection to producers of phonograms solely on the basis of the criterion of fixation may, by a notification deposited with the Secretary-General of the United Nations at the time of ratification, acceptance or accession, declare that it will apply, for the purposes of Article 5, the criterion of fixation alone and, for the purposes of paragraph 16.1(a)(iii) and 16.1(a)(iv), the criterion of fixation instead of the criterion of nationality.

ARTICLE 18

Any State which has deposited a notification under Article 5.3, Article 6.2, Article 16.1 or Article 17, may, by a further notification deposited with the Secretary-General of the United Nations, reduce its scope or withdraw it.

ARTICLE 19

Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 shall have no further application.

ARTICLE 20

1. This Convention shall not prejudice rights acquired in any Contracting State before the date of coming into force of this Convention for that State.
2. No Contracting State shall be bound to apply the provisions of this Convention to performances or broadcasts which took place, or to phonograms which were fixed, before the date of coming into force of this Convention for that State.

ARTICLE 21

The protection provided for in this Convention shall not prejudice any protection otherwise secured to performers, producers of phonograms and broadcasting organisations.

ARTICLE 22

Contracting States reserve the right to enter into special agreements among themselves in so far as such agreements grant to performers, producers of phonograms or broadcasting organisations more extensive rights than those granted by this Convention or contain other provisions not contrary to this Convention.

ARTICLE 23

This Convention shall be deposited with the Secretary-General of the United Nations. It shall be open until June 30, 1962, for signature by any State invited to the Diplomatic Conference on the International Protection of Performers,

Producers of Phonograms and Broadcasting Organisations which is a party to the Universal Copyright Convention or a member of the International Union for the Protection of Literary and Artistic Works.

ARTICLE 24

1. This Convention shall be subject to ratification or acceptance by the signatory States.
2. This Convention shall be open for accession by any State invited to the Conference referred to in Article 23, and by any State Member of the United Nations, provided that in either case such State is a party to the Universal Copyright Convention or a member of the International Union for the Protection of Literary and Artistic Works.
3. Ratification, acceptance or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General of the United Nations.

ARTICLE 25

1. This Convention shall come into force three months after the date of deposit of the sixth instrument of ratification, acceptance or accession.
2. Subsequently, this Convention shall come into force in respect of each State three months after the date of deposit of its instrument of ratification, acceptance or accession.

ARTICLE 26

1. Each Contracting State undertakes to adopt, in accordance with its Constitution, the measures necessary to ensure the application of this Convention.
2. At the time of deposit of its instrument of ratification, acceptance or accession, each State must be in a position under its domestic law to give effect to the terms of this Convention.

ARTICLE 27

1. Any State may, at the time of ratification, acceptance or accession, or at any time thereafter, declare by notification addressed to the Secretary-General of the United Nations that this Convention shall extend to all or any of the territories for whose international relations it is responsible, provided that the Universal Copyright Convention or the International Convention for the Protection of Literary and Artistic Works applies to the territory or territories concerned. This notification shall take effect three months after the date of its receipt.
2. The notifications referred to in Article 5.3, Article 6.2, Article 16.1 and Articles 17 and 18, may be extended to cover all or any of the territories referred to in paragraph 1 of this Article.

ARTICLE 28

1. Any Contracting State may denounce this Convention, on its own behalf or on behalf of all or any of the territories referred to in Article 27.
2. The denunciation shall be effected by a notification addressed to the Secretary-General of the United Nations and shall take effect twelve months after the date of receipt of the notification.
3. The right of denunciation shall not be exercised by a Contracting State before the expiry of a period of five years from the date on which the Convention came into force with respect to that State.
4. A Contracting State shall cease to be a party to this Convention from that time when it is neither a party to the Universal Copyright Convention nor a member of the International Union for the Protection of Literary and Artistic Works.
5. This Convention shall cease to apply to any territory referred to in Article 27 from that time when neither the Universal Copyright Convention nor the International Convention for the Protection of Literary and Artistic Works applies to that territory.

ARTICLE 29

1. After this Convention has been in force for five years, any Contracting State may, by notification addressed to the Secretary-General of the United Nations, request that a conference be convened for the purpose

of revising the Convention. The Secretary-General shall notify all Contracting States of this request. If, within a period of six months following the date of notification by the Secretary-General of the United Nations, not less than one half of the Contracting States notify him of their concurrence with the request, the Secretary-General shall inform the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works, who shall convene a revision conference in co-operation with the Intergovernmental Committee provided for in Article 32.

2. The adoption of any revision of this Convention shall require an affirmative vote by two-thirds of the States attending the revision conference, provided that this majority includes two-thirds of the States which, at the time of the revision conference, are parties to the Convention.
3. In the event of adoption of a Convention revising this Convention in whole or in part, and unless the revising Convention provides otherwise:
   (a) this Convention shall cease to be open to ratification, acceptance or accession as from the date of entry into force of the revising Convention;
   (b) this Convention shall remain in force as regards relations between or with Contracting States which have not become parties to the revising Convention.

ARTICLE 30

Any dispute which may arise between two or more Contracting States concerning the interpretation or application of this Convention and which is not settled by negotiation shall, at the request of any one of the parties to the dispute, be referred to the International Court of Justice for decision, unless they agree to another mode of settlement.

ARTICLE 31

Without prejudice to the provisions of Article 5.3, Article 6.2, Article 16.1 and Article 17, no reservation may be made to this Convention.

ARTICLE 32

1. An Intergovernmental Committee is hereby established with the following duties:
   (a) to study questions concerning the application and operation of this Convention; and
   (b) to collect proposals and to prepare documentation for possible revision of this Convention.
2. The Committee shall consist of representatives of the Contracting States, chosen with due regard to equitable geographical distribution. The number of members shall be six if there are twelve Contracting States or less, nine if there are thirteen to eighteen Contracting States and twelve if there are more than eighteen Contracting States.
3. The Committee shall be constituted twelve months after the Convention comes into force by an election organised among the Contracting States, each of which shall have one vote, by the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works, in accordance with rules previously approved by a majority of all Contracting States.
4. The Committee shall elect its Chairman and officers. It shall establish its own rules of procedure. These rules shall in particular provide for the future operation of the Committee and for a method of selecting its members for the future in such a way as to ensure rotation among the various Contracting States.
5. Officials of the International Labour Office, the United Nations Educational, Scientific and Cultural Organization and the Bureau of the International Union for the Protection of Literary and Artistic Works, designated by the Directors-General and the Director thereof, shall constitute the Secretariat of the Committee.
6. Meetings of the Committee, which shall be convened whenever a majority of its members deems it necessary, shall be held successively at the headquarters of the International Labour Office, the United Nations Educational, Scientific and Cultural Organization and the Bureau of the International Union for the Protection of Literary and Artistic Works.
7. Expenses of members of the Committee shall be borne by their respective Governments.

ARTICLE 33

1. The present Convention is drawn up in English, French and Spanish, the three texts being equally authentic.
2. In addition, official texts of the present Convention shall be drawn up in German, Italian and Portuguese.

ARTICLE 34

1. The Secretary-General of the United Nations shall notify the States invited to the Conference referred to in Article 23 and every State Member of the United Nations, as well as the Director-General of the International Labour Office, the Director- General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works:
   (a) of the deposit of each instrument of ratification, acceptance or accession;
   (b) of the date of entry into force of the Convention;
   (c) of all notifications, declarations or communications provided for in this Convention;
   (d) if any of the situations referred to in paragraphs 28.4 and 28.5 arise.
2. The Secretary-General of the United Nations shall also notify the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works of the requests communicated to him in accordance with Article 29, as well as of any communication received from the Contracting States concerning the revision of the Convention.

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APPENDIX
4

Rome Convention, Contracting Parties*

Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Albania	Rome Convention	In Force	September 1, 2000
Algeria	Rome Convention	In Force	April 22, 2007
Andorra	Rome Convention	In Force	May 25, 2004
Argentina	Rome Convention	In Force	March 2, 1992
Armenia	Rome Convention	In Force	January 31, 2003
Australia	Rome Convention	In Force	September 30, 1992
Austria	Rome Convention	In Force	June 9, 1973
Azerbaijan	Rome Convention	In Force	October 5, 2005
Bahrain	Rome Convention	In Force	January 18, 2006
Barbados	Rome Convention	In Force	September 18, 1983
Belarus	Rome Convention	In Force	May 27, 2003
Belgium	Rome Convention	In Force	October 2, 1999
Bolivia (Plurinational State of)	Rome Convention	In Force	November 24, 1993
Brazil	Rome Convention	In Force	September 29, 1965
Bulgaria	Rome Convention	In Force	August 31, 1995
Burkina Faso	Rome Convention	In Force	January 14, 1988
Cambodia	Rome Convention	Signature	
Canada	Rome Convention	In Force	June 4, 1998
Cape Verde	Rome Convention	In Force	July 3, 1997
Chile	Rome Convention	In Force	September 5, 1974
Colombia	Rome Convention	In Force	September 17, 1976
Congo	Rome Convention	In Force	May 18, 1964
Costa Rica	Rome Convention	In Force	September 9, 1971
Croatia	Rome Convention	In Force	April 20, 2000
Czech Republic	Rome Convention	In Force	January 1, 1993
Denmark	Rome Convention	In Force	September 23, 1965

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Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Dominica	Rome Convention	In Force	November 9, 1999
Dominican Republic	Rome Convention	In Force	January 27, 1987
Ecuador	Rome Convention	In Force	May 18, 1964
El Salvador	Rome Convention	In Force	June 29, 1979
Estonia	Rome Convention	In Force	April 28, 2000
Fiji	Rome Convention	In Force	April 11, 1972
Finland	Rome Convention	In Force	October 21, 1983
France	Rome Convention	In Force	July 3, 1987
Georgia	Rome Convention	In Force	August 14, 2004
Germany	Rome Convention	In Force	October 21, 1966
Greece	Rome Convention	In Force	January 6, 1993
Guatemala	Rome Convention	In Force	January 14, 1977
Holy See	Rome Convention	Signature	
Honduras	Rome Convention	In Force	February 16, 1990
Hungary	Rome Convention	In Force	February 10, 1995
Iceland	Rome Convention	In Force	June 15, 1994
India	Rome Convention	Signature	
Ireland	Rome Convention	In Force	September 19, 1979
Israel	Rome Convention	In Force	December 30, 2002
Italy	Rome Convention	In Force	April 8, 1975
Jamaica	Rome Convention	In Force	January 27, 1994
Japan	Rome Convention	In Force	October 26, 1989
Kyrgyzstan	Rome Convention	In Force	August 13, 2003
Latvia	Rome Convention	In Force	August 20, 1999
Lebanon	Rome Convention	In Force	August 12, 1997
Lesotho	Rome Convention	In Force	January 26, 1990
Liechtenstein	Rome Convention	In Force	October 12, 1999
Lithuania	Rome Convention	In Force	July 22, 1999
Luxembourg	Rome Convention	In Force	February 25, 1976
Mexico	Rome Convention	In Force	May 18, 1964
Monaco	Rome Convention	In Force	December 6, 1985
Montenegro	Rome Convention	In Force	June 3, 2006
Netherlands	Rome Convention	In Force	October 7, 1993
Nicaragua	Rome Convention	In Force	August 10, 2000
Niger	Rome Convention	In Force	May 18, 1964
Nigeria	Rome Convention	In Force	October 29, 1993
Norway	Rome Convention	In Force	July 10, 1978
Panama	Rome Convention	In Force	September 2, 1983
Paraguay	Rome Convention	In Force	February 26, 1970
Peru	Rome Convention	In Force	August 7, 1985

Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Philippines	Rome Convention	In Force	September 25, 1984
Poland	Rome Convention	In Force	June 13, 1997
Portugal	Rome Convention	In Force	July 17, 2002
Republic of Korea	Rome Convention	In Force	March 18, 2009
Republic of Moldova	Rome Convention	In Force	December 5, 1995
Romania	Rome Convention	In Force	October 22, 1998
Russian Federation	Rome Convention	In Force	May 26, 2003
Saint Lucia	Rome Convention	In Force	August 17, 1996
Serbia	Rome Convention	In Force	June 10, 2003
Slovakia	Rome Convention	In Force	January 1, 1993
Slovenia	Rome Convention	In Force	October 9, 1996
Spain	Rome Convention	In Force	November 14, 1991
Sweden	Rome Convention	In Force	May 18, 1964
Switzerland	Rome Convention	In Force	September 24, 1993
Syrian Arab Republic	Rome Convention	In Force	May 13, 2006
Tajikistan	Rome Convention	In Force	May 19, 2008
The former Yugoslav Republic of Macedonia	Rome Convention	In Force	March 2, 1998
Togo	Rome Convention	In Force	June 10, 2003
Turkey	Rome Convention	In Force	April 8, 2004
Ukraine	Rome Convention	In Force	June 12, 2002
United Arab Emirates	Rome Convention	In Force	January 14, 2005
United Kingdom	Rome Convention	In Force	May 18, 1964
Uruguay	Rome Convention	In Force	July 4, 1977
Venezuela (Bolivarian Republic of)	Rome Convention	In Force	January 30, 1996
Viet Nam	Rome Convention	In Force	March 1, 2007

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APPENDIX

5

WIPO Copyright Treaty [With Agreed Statements]

[Adopted by the Diplomatic Conference on December 20, 1996 (Geneva)]

Preambles

Article 1: Relation to the Berne Convention
Article 2: Scope of Copyright Protection
Article 3: Application of Articles 2 to 6 of the Berne Convention
Article 4: Computer Programs
Article 5: Compilations of Data (Databases)
Article 6: Right of Distribution
Article 7: Right of Rental
Article 8: Right of Communication to the Public
Article 9: Duration of the Protection of Photographic Works
Article 10: Limitations and Exceptions
Article 11: Obligations concerning Technological Measures
Article 12: Obligations concerning Rights Management Information
Article 13: Application in Time
Article 14: Provisions on Enforcement of Rights
Article 15: Assembly
Article 16: International Bureau
Article 17: Eligibility for Becoming Party to the Treaty
Article 18: Rights and Obligations under the Treaty
Article 19: Signature of the Treaty
Article 20: Entry into Force of the Treaty
Article 21: Effective Date of Becoming Party to the Treaty
Article 22: No Reservations to the Treaty
Article 23: Denunciation of the Treaty
Article 24: Languages of the Treaty
Article 25: Depositary

PREAMBLE

***The Contracting Parties*,**

Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,

Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation,

Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention,

Have agreed as follows:

ARTICLE 1

Relation to the Berne Convention

(1) This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.

(3) Hereinafter, "Berne Convention" shall refer to the Paris Act of July 24, 1971, of the Berne Convention for the Protection of Literary and Artistic Works.

(4) Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.

ARTICLE 2

Scope of Copyright Protection

Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

ARTICLE 3

Application of Articles 2 to 6 of the Berne Convention

Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in this Treaty.

ARTICLE 4

Computer Programs

Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.

ARTICLE 5

Compilations of Data (Databases)

Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

ARTICLE 6

Right of Distribution

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.
(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.

ARTICLE 7

Right of Rental

(1) Authors of
  (i) computer programs;
  (ii) cinematographic works; and
  (iii) works embodied in phonograms, as determined in the national law of Contracting Parties,

shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works.
(2) Paragraph (1) shall not apply
  (i) in the case of computer programs, where the program itself is not the essential object of the rental; and
  (ii) in the case of cinematographic works, unless such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction.
(3) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of authors for the rental of copies of their works embodied in phonograms may maintain that system provided that the commercial rental of works embodied in phonograms is not giving rise to the material impairment of the exclusive right of reproduction of authors.

ARTICLE 8

Right of Communication to the Public

Without prejudice to the provisions of Articles II(I)(ii), II*bis*(I)(i) and (ii), II*ter*(I)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

ARTICLE 9

Duration of the Protection of Photographic Works

In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention.

ARTICLE 10

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

ARTICLE 11

Obligations Concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

ARTICLE 12

Obligations Concerning Rights Management Information

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:
   (i) to remove or alter any electronic rights management information without authority;
   (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

ARTICLE 13

Application in Time

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.

ARTICLE 14

Provisions on Enforcement of Rights

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.
(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

ARTICLE 15

Assembly

(1) (a) The Contracting Parties shall have an Assembly.
(b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.
(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask the World Intellectual Property Organization (hereinafter referred to as "WIPO") to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.
(2) (a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.
(b) The Assembly shall perform the function allocated to it under Article 17(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.
(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.
(3) (a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and *vice versa*.

(4) The Assembly shall meet in ordinary session once every two years upon convocation by the Director General of WIPO.

(5) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

ARTICLE 16

International Bureau

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

Article 17

Eligibility for Becoming Party to the Treaty

(1) Any Member State of WIPO may become party to this Treaty.

(2) The Assembly may decide to admit any intergovernmental organization to be come party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.

(3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

ARTICLE 18

Rights And Obligations Under the Treaty

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

ARTICLE 19

Signature of the Treaty

This Treaty shall be open for signature until December 31, 1997, by any Member State of WIPO and by the European Community.

ARTICLE 20

Entry Into Force of the Treaty

This Treaty shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO.

ARTICLE 21

Effective Date of Becoming Party to the Treaty

This Treaty shall bind

(i) the 30 States referred to in Article 20, from the date on which this Treaty has entered into force;

(ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;

(iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 20, or, three months after the entry into force of this Treaty if

such instrument has been deposited before the entry into force of this Treaty;

(iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

ARTICLE 22

No Reservations to the Treaty

No reservation to this Treaty shall be admitted.

ARTICLE 23

Denunciation of the Treaty

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

ARTICLE 24

Languages of the Treaty

(1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.

(2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, "interested party" means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

ARTICLE 25

Agreed Statements

Depositary

The Director General of WIPO is the depositary of this Treaty.

Agreed Statements Concerning the WIPO Copyright Treaty

Adopted by the Diplomatic Conference on December 20, 1996

Concerning Article 1(4)

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

Concerning Article 3

It is understood that in applying Article 3 of this Treaty, the expression "country of the Union" in Articles 2 to 6 of the Berne Convention will be read as if it were a reference to a Contracting Party to this Treaty, in the application of those Berne Articles in respect of protection provided for in this Treaty. It is also understood that the expression "country outside the Union" in those Articles in the Berne Convention will, in the same circumstances, be read as if it were a reference to a country that is not a Contracting Party to this Treaty, and that "this Convention" in Articles 2(8), 2*bis*(2), 3, 4 and 5 of the Berne Convention will be read as if it were a reference to the Berne Convention and this Treaty. Finally, it is understood that a reference in Articles 3 to 6 of the Berne Convention to a "national of one of the countries of the Union" will, when these Articles are applied to this Treaty, mean, in regard to an intergovernmental organization that is a Contracting Party to this Treaty, a national of one of the countries that is a member of that organization.

Concerning Article 4

The scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPs Agreement.

Concerning Article 5

The scope of protection for compilations of data (databases) under Article 5 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPs Agreement.

Concerning Articles 6 and 7

As used in these Articles, the expressions "copies" and "original and copies," being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

Concerning Article 7

It is understood that the obligation under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under that Contracting Party's law, are not granted rights in respect of phonograms. It is understood that this obligation is consistent with Article 14(4) of the TRIPs Agreement.

Concerning Article 8

It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article II*bis*(2).

Concerning Article 10

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

Concerning Article 12

It is understood that the reference to "infringement of any right covered by this Treaty or the Berne Convention" includes both exclusive rights and rights of remuneration.

It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.

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APPENDIX

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WIPO Copyright Treaty, Contracting Parties*

Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Albania	WIPO Copyright Treaty	In Force	August 6, 2005
Argentina	WIPO Copyright Treaty	In Force	March 6, 2002
Armenia	WIPO Copyright Treaty	In Force	March 6, 2005
Australia	WIPO Copyright Treaty	In Force	July 26, 2007
Austria	WIPO Copyright Treaty	In Force	March 14, 2010
Azerbaijan	WIPO Copyright Treaty	In Force	April 11, 2006
Bahrain	WIPO Copyright Treaty	In Force	December 15, 2005
Belarus	WIPO Copyright Treaty	In Force	March 6, 2002
Belgium	WIPO Copyright Treaty	In Force	August 30, 2006
Benin	WIPO Copyright Treaty	In Force	April 16, 2006
Bolivia (Plurinational State of)	WIPO Copyright Treaty	Signature	
Bosnia and Herzegovina	WIPO Copyright Treaty	In Force	November 25, 2009
Botswana	WIPO Copyright Treaty	In Force	January 27, 2005
Bulgaria	WIPO Copyright Treaty	In Force	March 6, 2002
Burkina Faso	WIPO Copyright Treaty	In Force	March 6, 2002
Canada	WIPO Copyright Treaty	Signature	
Chile	WIPO Copyright Treaty	In Force	March 6, 2002
China	WIPO Copyright Treaty	In Force	June 9, 2007
Colombia	WIPO Copyright Treaty	In Force	March 6, 2002
Costa Rica	WIPO Copyright Treaty	In Force	March 6, 2002
Croatia	WIPO Copyright Treaty	In Force	March 6, 2002
Cyprus	WIPO Copyright Treaty	In Force	November 4, 2003
Czech Republic	WIPO Copyright Treaty	In Force	March 6, 2002
Denmark	WIPO Copyright Treaty	In Force	March 14, 2010

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Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Dominican Republic	WIPO Copyright Treaty	In Force	January 10, 2006
Ecuador	WIPO Copyright Treaty	In Force	March 6, 2002
El Salvador	WIPO Copyright Treaty	In Force	March 6, 2002
Estonia	WIPO Copyright Treaty	In Force	March 14, 2010
Finland	WIPO Copyright Treaty	In Force	March 14, 2010
France	WIPO Copyright Treaty	In Force	March 14, 2010
Gabon	WIPO Copyright Treaty	In Force	March 6, 2002
Georgia	WIPO Copyright Treaty	In Force	March 6, 2002
Germany	WIPO Copyright Treaty	In Force	March 14, 2010
Ghana	WIPO Copyright Treaty	In Force	November 18, 2006
Greece	WIPO Copyright Treaty	In Force	March 14, 2010
Guatemala	WIPO Copyright Treaty	In Force	February 4, 2003
Guinea	WIPO Copyright Treaty	In Force	May 25, 2002
Honduras	WIPO Copyright Treaty	In Force	May 20, 2002
Hungary	WIPO Copyright Treaty	In Force	March 6, 2002
Indonesia	WIPO Copyright Treaty	In Force	March 6, 2002
Ireland	WIPO Copyright Treaty	In Force	March 14, 2010
Israel	WIPO Copyright Treaty	Signature	
Italy	WIPO Copyright Treaty	In Force	March 14,2010
Jamaica	WIPO Copyright Treaty	In Force	June 12, 2002
Japan	WIPO Copyright Treaty	In Force	March 6, 2002
Jordan	WIPO Copyright Treaty	In Force	April 27, 2004
Kazakhstan	WIPO Copyright Treaty	In Force	November 12, 2004
Kenya	WIPO Copyright Treaty	Signature	
Kyrgyzstan	WIPO Copyright Treaty	In Force	March 6, 2002
Latvia	WIPO Copyright Treaty	In Force	March 6, 2002
Liechtenstein	WIPO Copyright Treaty	In Force	April 30, 2007
Lithuania	WIPO Copyright Treaty	In Force	March 6, 2002
Luxembourg	WIPO Copyright Treaty	In Force	March 14, 2010
Mali	WIPO Copyright Treaty	In Force	April 24, 2002
Malta	WIPO Copyright Treaty	In Force	March 14, 2010
Mexico	WIPO Copyright Treaty	In Force	March 6, 2002
Monaco	WIPO Copyright Treaty	Signature	
Mongolia	WIPO Copyright Treaty	In Force	October 25, 2002
Montenegro	WIPO Copyright Treaty	In Force	June 3, 2006
Namibia	WIPO Copyright Treaty	Signature	
Netherlands	WIPO Copyright Treaty	In Force	March 14, 2010
Nicaragua	WIPO Copyright Treaty	In Force	March 6, 2003
Nigeria	WIPO Copyright Treaty	Signature	
Oman	WIPO Copyright Treaty	In Force	September 20, 2005
Panama	WIPO Copyright Treaty	In Force	March 6, 2002

Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Paraguay	WIPO Copyright Treaty	In Force	March 6, 2002
Peru	WIPO Copyright Treaty	In Force	March 6, 2002
Philippines	WIPO Copyright Treaty	In Force	October 4, 2002
Poland	WIPO Copyright Treaty	In Force	March 23, 2004
Portugal	WIPO Copyright Treaty	In Force	March 14, 2010
Qatar	WIPO Copyright Treaty	In Force	October 28, 2005
Republic of Korea	WIPO Copyright Treaty	In Force	June 24, 2004
Republic of Moldova	WIPO Copyright Treaty	In Force	March 6, 2002
Romania	WIPO Copyright Treaty	In Force	March 6, 2002
Russian Federation	WIPO Copyright Treaty	In Force	February 5, 2009
Saint Lucia	WIPO Copyright Treaty	In Force	March 6, 2002
Senegal	WIPO Copyright Treaty	In Force	May 18, 2002
Serbia	WIPO Copyright Treaty	In Force	June 13, 2003
Singapore	WIPO Copyright Treaty	In Force	April 17, 2005
Slovakia	WIPO Copyright Treaty	In Force	March 6, 2002
Slovenia	WIPO Copyright Treaty	In Force	March 6, 2002
South Africa	WIPO Copyright Treaty	Signature	
Spain	WIPO Copyright Treaty	In Force	March 14, 2010
Sweden	WIPO Copyright Treaty	In Force	March 14, 2010
Switzerland	WIPO Copyright Treaty	In Force	July 1, 2008
Tajikistan	WIPO Copyright Treaty	In Force	April 5, 2009
The former Yugoslav Republic of Macedonia	WIPO Copyright Treaty	In Force	February 4, 2004
Togo	WIPO Copyright Treaty	In Force	May 21, 2003
Trinidad and Tobago	WIPO Copyright Treaty	In Force	November 28, 2008
Turkey	WIPO Copyright Treaty	In Force	November 28, 2008
Ukraine	WIPO Copyright Treaty	In Force	March 6, 2002
United Arab Emirates	WIPO Copyright Treaty	In Force	July 14, 2004
United Kingdom	WIPO Copyright Treaty	In Force	March 14, 2010
United States of America	WIPO Copyright Treaty	In Force	March 6, 2002
Uruguay	WIPO Copyright Treaty	In Force	June 5, 2009
Venezuela (Bolivarian Republic of)	WIPO Copyright Treaty	Signature	

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APPENDIX
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WIPO Performances and Phonograms Treaty [With Agreed Statements]

[Adopted by the Diplomatic Conference on December 20, 1996 (Geneva)]

Preambles

Chapter I: General Provisions
Article 1: Relation to Other Conventions
Article 2: Definitions
Article 3: Beneficiaries of Protection under this Treaty
Article 4: National Treatment
Chapter II: Rights of Performers
Article 5: Moral Rights of Performers
Article 6: Economic Rights of Performers in their Unfixed Performances
Article 7: Right of Reproduction
Article 8: Right of Distribution
Article 9: Right of Rental
Article 10: Right of Making Available of Fixed Performances
Chapter III: Rights of Producers of Phonograms
Article 11: Right of Reproduction
Article 12: Right of Distribution
Article 13: Right of Rental
Article 14: Right of Making Available of Phonograms
Chapter IV: Common Provisions
Article 15: Right to Remuneration for Broadcasting and Communication to the Public
Article 16: Limitations and Exceptions
Article 17: Term of Protection
Article 18: Obligations concerning Technological Measures
Article 19: Obligations concerning Rights Management Information
Article 20: Formalities
Article 21: Reservations
Article 22: Application in Time

Article 23: Provisions on Enforcement of Rights
Chapter V: Administrative and Final Clauses
Article 24: Assembly
Article 25: International Bureau
Article 26: Eligibility for Becoming Party to the Treaty
Article 27: Rights and Obligations under the Treaty
Article 28: Signature of the Treaty
Article 29: Entry into Force of the Treaty
Article 30: Effective Date of Becoming Party to the Treaty
Article 31: Denunciation of the Treaty
Article 32: Languages of the Treaty
Article 33: Depositary

Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms,

Recognizing the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information,

Have agreed as follows:

Chapter I: General Provisions

ARTICLE 1

Relation to Other Conventions

(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International

Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the "Rome Convention").

(2) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.

(3) This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.

ARTICLE 2

Definitions

For the purposes of this Treaty:

(a) "performers" are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;

(b) "phonogram" means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;

(c) "fixation" means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;

(d) "producer of a phonogram" means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds;

(e) "publication" of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity;

(f) "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting"; transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

(g) "communication to the public" of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the

representations of sounds fixed in a phonogram. For the purposes of Article 15, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

ARTICLE 3

Beneficiaries Of Protection Under This Treaty

(1) Contracting Parties shall accord the protection provided under this Treaty to the performers and producers of phonograms who are nationals of other Contracting Parties.
(2) The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that Convention. In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.
(3) Any Contracting Party availing itself of the possibilities provided in Article 5(3) of the Rome Convention or, for the purposes of Article 5 of the same Convention, Article 17 thereof shall make a notification as foreseen in those provisions to the Director General of the World Intellectual Property Organization (WIPO).

ARTICLE 4

National Treatment

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.
(2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.

Chapter II: Rights of Performers

ARTICLE 5

Moral Rights of Performers

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.

(2) The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.

ARTICLE 6

Economic Rights of Performers in Their Unfixed Performances

Performers shall enjoy the exclusive right of authorizing, as regards their performances:

(i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and

(ii) the fixation of their unfixed performances.

ARTICLE 7

Right of Reproduction

Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.

ARTICLE 8

Right of Distribution

(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.
(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.

ARTICLE 9

Right of Rental

(1) Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.
(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of performers.

ARTICLE 10

Right of Making Available of Fixed Performances

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Chapter III: Rights of Producers of Phonograms

ARTICLE 11

Right of Reproduction

Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their phonograms, in any manner or form.

ARTICLE 12

Right of Distribution

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership.
(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the phonogram with the authorization of the producer of the phonogram.

ARTICLE 13

Right of Rental

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their

phonograms, even after distribution of them by or pursuant to authorization by the producer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of producers of phonograms for the rental of copies of their phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of producers of phonograms.

ARTICLE 14

Right of Making Available of Phonograms

Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Chapter IV: Common Provisions

ARTICLE 15

Right to Remuneration for Broadcasting and Communication to the Public

(1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

(3) Any Contracting Party may in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1)

only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

(4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.

ARTICLE 16

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.

ARTICLE 17

Term of Protection

(1) The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed in a phonogram.

(2) The term of protection to be granted to producers of phonograms under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the phonogram was published, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made.

ARTICLE 18

Obligations Concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

ARTICLE 19

Obligations Concerning Rights Management Information

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:
   (i) to remove or alter any electronic rights management information without authority;
   (ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.

ARTICLE 20

Formalities

The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

ARTICLE 21

Reservations

Subject to the provisions of Article 15(3), no reservations to this Treaty shall be permitted.

ARTICLE 22

Application in Time

(1) Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis,* to the rights of performers and producers of phonograms provided for in this Treaty.
(2) Notwithstanding paragraph (1), a Contracting Party may limit the application of Article 5 of this Treaty to performances which occurred after the entry into force of this Treaty for that Party.

ARTICLE 23

Provisions on Enforcement of Rights

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.
(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

Chapter V: Administrative and Final Clauses

ARTICLE 24

Assembly

(1) (a) The Contracting Parties shall have an Assembly.
(b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.
(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask WIPO to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.

(2) (a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.
(b) The Assembly shall perform the function allocated to it under Article 26(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.
(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.

(3) (a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.
(b) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.

(4) The Assembly shall meet in ordinary session once every two years upon convocation by the Director General of WIPO.

(5) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

ARTICLE 25

International Bureau

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

ARTICLE 26

Eligibility for Becoming Party to the Treaty

(1) Any Member State of WIPO may become party to this Treaty.
(2) The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.
(3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

ARTICLE 27

Rights and Obligations Under the Treaty

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

ARTICLE 28

Signature of the Treaty

This Treaty shall be open for signature until December 31, 1997, by any Member State of WIPO and by the European Community.

ARTICLE 29

Entry Into Force of the Treaty

This Treaty shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO.

ARTICLE 30

Effective Date of Becoming Party to the Treaty

This Treaty shall bind

(i) the 30 States referred to in Article 29, from the date on which this Treaty has entered into force;

(ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;

(iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 29, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;

(iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

ARTICLE 31

Denunciation of the Treaty

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

ARTICLE 32

Languages of the Treaty

(1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.
(2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, "interested party" means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

ARTICLE 33

Agreed Statements

Depositary

The Director General of WIPO is the depositary of this Treaty.
Agreed Statements concerning the WIPO Performances and Phonograms Treaty
Adopted by the Diplomatic Conference on December 20, 1996

Concerning Article I

It is understood that Article 1(2) clarifies the relationship between rights in phonograms under this Treaty and copyright in works embodied in the phonograms. In cases where authorization is needed from both the author of a work embodied in the phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and vice versa.

It is further understood that nothing in Article 1(2) precludes a Contracting Party from providing exclusive rights to a performer or producer of phonograms beyond those required to be provided under this Treaty.

Concerning Article 2(B)

It is understood that the definition of phonogram provided in Article 2(b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work.

Concerning Articles 2(E), 8, 9, 12, and 13

As used in these Articles, the expressions "copies" and "original and copies," being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

Concerning Article 3

It is understood that the reference in Articles 5(a) and 16(a)(iv) of the Rome Convention to "national of another Contracting State" will, when applied to this Treaty, mean, in regard to an intergovernmental organization that is a Contracting Party to this Treaty, a national of one of the countries that is a member of that organization.

Concerning Article 3(2)

For the application of Article 3(2), it is understood that fixation means the finalization of the master tape ("bande-mère").

Concerning Articles 7, 11 and 16

The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles.

Concerning Article 15

It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that

should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution.

Concerning Article 15

It is understood that Article 15 does not prevent the granting of the right conferred by this Article to performers of folklore and producers of phonograms recording folklore where such phonograms have not been published for commercial gain.

Concerning Article 16

The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 16 (on Limitations and Exceptions) of the WIPO Performances and Phonograms Treaty.

Concerning Article 19

The agreed statement concerning Article 12 (on Obligations Concerning Rights Management Information) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 19 (on Obligations concerning Rights Management Information) of the WIPO Performances and Phonograms Treaty.

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APPENDIX

8

WIPO Performances and Phonograms Treaty, Contracting Parties*

Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Albania	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Argentina	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Armenia	WIPO Performances and Phonograms Treaty	In Force	March 6, 2005
Australia	WIPO Performances and Phonograms Treaty	In Force	July 26, 2007
Austria	WIPO Performances and Phonograms Treaty	In Force	March 14, 2010
Azerbaijan	WIPO Performances and Phonograms Treaty	In Force	April 11, 2006
Bahrain	WIPO Performances and Phonograms Treaty	In Force	December 15, 2005
Belarus	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Belgium	WIPO Performances and Phonograms Treaty	In Force	August 30, 2006
Benin	WIPO Performances and Phonograms Treaty	In Force	April 16, 2006
Bolivia (Plurinational State of)	WIPO Performances and Phonograms Treaty	Signature	
Bosnia and Herzegovina	WIPO Performances and Phonograms Treaty	In Force	November 25, 2009
Botswana	WIPO Performances and Phonograms Treaty	In Force	January 27, 2005

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Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Bulgaria	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Burkina Faso	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Canada	WIPO Performances and Phonograms Treaty	Signature	
Chile	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
China	WIPO Performances and Phonograms Treaty	In Force	June 9, 2007
Colombia	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Costa Rica	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Croatia	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Cyprus	WIPO Performances and Phonograms Treaty	In Force	December 2, 2005
Czech Republic	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Denmark	WIPO Performances and Phonograms Treaty	In Force	March 14, 2010
Dominican Republic	WIPO Performances and Phonograms Treaty	In Force	January 10, 2006
Ecuador	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
El Salvador	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Estonia	WIPO Performances and Phonograms Treaty	In Force	March 14, 2010
Finland	WIPO Performances and Phonograms Treaty	In Force	March 14, 2010
France	WIPO Performances and Phonograms Treaty	In Force	March 14, 2010
Gabon	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Georgia	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Germany	WIPO Performances and Phonograms Treaty	In Force	March 14, 2010
Ghana	WIPO Performances and Phonograms Treaty	Signature	

Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Greece	WIPO Performances and Phonograms Treaty	In Force	March 14, 2010
Guatemala	WIPO Performances and Phonograms Treaty	In Force	January 8, 2003
Guinea	WIPO Performances and Phonograms Treaty	In Force	May 25, 2002
Honduras	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Hungary	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Indonesia	WIPO Performances and Phonograms Treaty	In Force	February 15, 2005
Ireland	WIPO Performances and Phonograms Treaty	In Force	March 14, 2010
Israel	WIPO Performances and Phonograms Treaty	Signature	
Italy	WIPO Performances and Phonograms Treaty	In Force	March 14, 2010
Jamaica	WIPO Performances and Phonograms Treaty	In Force	June 12, 2002
Japan	WIPO Performances and Phonograms Treaty	In Force	October 9, 2002
Jordan	WIPO Performances and Phonograms Treaty	In Force	May 24, 2004
Kazakhstan	WIPO Performances and Phonograms Treaty	In Force	November 12, 2004
Kenya	WIPO Performances and Phonograms Treaty	Signature	
Kyrgyzstan	WIPO Performances and Phonograms Treaty	In Force	August 15, 2002
Latvia	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Liechtenstein	WIPO Performances and Phonograms Treaty	In Force	April 30, 2007
Lithuania	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Luxembourg	WIPO Performances and Phonograms Treaty	In Force	March 14, 2010
Mali	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Malta	WIPO Performances and Phonograms Treaty	In Force	March 14,2010

Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Mexico	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Monaco	WIPO Performances and Phonograms Treaty	Signature	
Mongolia	WIPO Performances and Phonograms Treaty	In Force	October 25, 2002
Montenegro	WIPO Performances and Phonograms Treaty	In Force	June 3, 2006
Namibia	WIPO Performances and Phonograms Treaty	Signature	
Netherlands	WIPO Performances and Phonograms Treaty	In Force	March 14, 2010
Nicaragua	WIPO Performances and Phonograms Treaty	In Force	March 6, 2003
Nigeria	WIPO Performances and Phonograms Treaty	Signature	
Oman	WIPO Performances and Phonograms Treaty	In Force	September 20, 2005
Panama	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Paraguay	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Peru	WIPO Performances and Phonograms Treaty	In Force	July 18, 2002
Philippines	WIPO Performances and Phonograms Treaty	In Force	October 4, 2002
Poland	WIPO Performances and Phonograms Treaty	In Force	October 21, 2003
Portugal	WIPO Performances and Phonograms Treaty	In Force	March 14, 2010
Qatar	WIPO Performances and Phonograms Treaty	In Force	October 28, 2005
Republic of Korea	WIPO Performances and Phonograms Treaty	In Force	March 18, 2009
Republic of Moldova	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Romania	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Russian Federation	WIPO Performances and Phonograms Treaty	In Force	February 5, 2009
Saint Lucia	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002

Contracting Party	*Treaty*	*Status*	*Entry Into Force*
Senegal	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Serbia	WIPO Performances and Phonograms Treaty	In Force	June 13, 2003
Singapore	WIPO Performances and Phonograms Treaty	In Force	April 17, 2005
Slovakia	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Slovenia	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
South Africa	WIPO Performances and Phonograms Treaty	Signature	
Spain	WIPO Performances and Phonograms Treaty	In Force	March 14, 2010
Sweden	WIPO Performances and Phonograms Treaty	In Force	March 14, 2010
Switzerland	WIPO Performances and Phonograms Treaty	In Force	July 1, 2008
The former Yugoslav Republic of Macedonia	WIPO Performances and Phonograms Treaty	In Force	March 20, 2005
Togo	WIPO Performances and Phonograms Treaty	In Force	May 21, 2003
Trinidad and Tobago	WIPO Performances and Phonograms Treaty	In Force	November 28, 2008
Turkey	WIPO Performances and Phonograms Treaty	In Force	November 28, 2008
Ukraine	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
United Arab Emirates	WIPO Performances and Phonograms Treaty	In Force	June 9, 2005
United Kingdom	WIPO Performances and Phonograms Treaty	In Force	March 14, 2010
United States of America	WIPO Performances and Phonograms Treaty	In Force	May 20, 2002
Uruguay	WIPO Performances and Phonograms Treaty	In Force	August 28, 2008
Venezuela (Bolivarian Republic of)	WIPO Performances and Phonograms Treaty	Signature	

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APPENDIX

9

Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods [TRIPs Agreement]

[Selected provisions of the Agreement Amending the General Agreement on Tariffs and Trade and Creating the World Trade Organization, Signed by the Members of GATT April 15, 1994 at Marrakesh, Morocco.]

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8. Control of Anti-Competitive Practices in Contractual Licences

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1. General Obligations
2. Civil and Administrative Procedures and Remedies
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4. Special Requirements Related to Border Measures
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Part IV: Acquisition and Maintenance of Intellectual Property Rights and Related Inter-Partes Procedures
Part V: Dispute Prevention and Settlement
Part VI: Transitional Arrangements
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Preamble

Members,
Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;
Recognizing, to this end, the need for new rules and disciplines concerning:

(a) the applicability of the basic principles of the GATT 1994 and of relevant international intellectual property agreements or conventions;
(b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;
(c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;
(d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments; and
(e) transitional arrangements aiming at the fullest participation in the results of the negotiations;

Recognizing the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods;

Recognizing that intellectual property rights are private rights;

Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives;

Recognizing also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base;

Emphasizing the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures;

Desiring to establish a mutually supportive relationship between the MTO and the World Intellectual Property Organization (WIPO) as well as other relevant inter national organisations;
Hereby agree as follows:

Part I: General Provisions and Basic Principles

ARTICLE I

Nature and Scope of Obligations

1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their domestic law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.
2. For the purposes of this Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 to 7 of Part II.
3. Members shall accord the treatment provided for in this Agreement to the nationals of other Members.[1] In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the MTO members of those conventions.[2] Any Member availing itself of the possibilities provided in paragraph 3 of Article 5 or paragraph 2 of Article 6 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights.

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1. When "nationals" are referred to in this Agreement, they shall be deemed, in the case of a separate customs territory Member of the MTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.
2. In this Agreement, "Paris Convention" refers to the Paris Convention for the Protection of Industrial Property; "Paris Convention (1967)" refers to the Stockholm Act of this Convention of 14 July 1967. "Berne Convention" refers to the Berne Convention for the Protection of Literary and Artistic Works; "Berne Convention (1971)" refers to the Paris Act of this Convention of 24 July 1971. "Rome Convention" refers to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, adopted at Rome on 26 October 1961. "Treaty on Intellectual Property in Respect of Integrated Circuits" (IPIC Treaty) refers to the Treaty on Intellectual Property in Respect of Integrated Circuits, adopted at Washington on 26 May 1989.

ARTICLE 2

Intellectual Property Conventions

1. In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1-12 and 19 of the Paris Convention (1967).
2. Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

ARTICLE 3

National Treatment

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection[3] of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention and paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights.
2. Members may avail themselves of the exceptions permitted under paragraph 1 above in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

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3. For the purposes of Articles 3 and 4 of this Agreement, protection shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

ARTICLE 4

Most-Favoured-Nation Treatment

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

(a) deriving from international agreements on judicial assistance and law enforcement of a general nature and not particularly confined to the protection of intellectual property;
(b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;
(c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;
(d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the Agreement Establishing the MTO, provided that such agreements are notified to the Council for Trade-Related Aspects of Intellectual Property Rights and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

ARTICLE 5

Multilateral Agreements on Acquisition or Maintenance of Protection

The obligations under Articles 3 and 4 above do not apply to procedures provided in multilateral agreements concluded under the auspices of the World Intellectual Property Organization relating to the acquisition or maintenance of intellectual property rights.

ARTICLE 6

Exhaustion

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 above nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

ARTICLE 7

Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

ARTICLE 8

Principles

1. Members may, in formulating or amending their national laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Part II: Standards Concerning the Availability, Scope and Use of Intellectual Property Rights

Section 1: Copyright and Related Rights

ARTICLE 9

Relation to Berne Convention

1. Members shall comply with Articles 1-21 and the Appendix of the Berne Convention (1971). However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.
2. Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

ARTICLE 10

Computer Programs and Compilations of Data

1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).
2. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

ARTICLE 11

Rental Rights

In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread

copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

ARTICLE 12

Term of Protection

Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than fifty years from the end of the calendar year of authorized publication, or, failing such authorized publication within fifty years from the making of the work, fifty years from the end of the calendar year of making.

ARTICLE 13

Limitations and Exceptions

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

ARTICLE 14

Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations

1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.
3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).
4. The provisions of Article 11 in respect of computer programs shall apply *mutatis mutandis* to producers of phonograms and any other right holders in phonograms as determined in domestic law. If, on the date of the Ministerial Meeting concluding the Uruguay Round of Multilateral Trade Negotiations, a Member has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.
5. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of fifty years computed from the end of the calendar year in which the fixation was made or the performance took place. The term of protection granted pursuant to paragraph 3 above shall last for at least twenty years from the end of the calendar year in which the broadcast took place.
6. Any Member may, in relation to the rights conferred under paragraphs 1–3 above, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, *mutatis mutandis,* to the rights of performers and producers of phonograms in phonograms.

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APPENDIX
10

Members of the World Trade Organization [WTO]

Albania
Angola
Antigua and Barbuda
Argentina
Armenia
Australia
Austria
Bahrain, Kingdom of
Bangladesh
Barbados
Belgium
Belize
Benin
Bolivia
Botswana
Brazil
Brunei Darussalam
Bulgaria
Burkina Faso
Burundi
Cambodia
Cameroon
Canada
Cape Verde
Central African Republic
Chad
Chile
China
Colombia
Congo
Costa Rica
Côte d'Ivoire
Croatia
Cuba
Cyprus
Czech Republic
Democratic Republic of the Congo
Denmark
Djibouti
Dominica
Dominican Republic
Ecuador
Egypt
El Salvador
Estonia
European Union (formerly European Communities)
Fiji
Finland
Former Yugoslav Republic of Macedonia (FYROM)
France
Gabon
The Gambia
Georgia
Germany
Ghana
Greece
Grenada
Guatemala
Guinea
Guinea Bissau
Guyana
Haiti
Honduras
Hong Kong, China

Hungary
Iceland
India
Indonesia
Ireland
Israel
Italy
Jamaica
Japan
Jordan
Kenya
Korea, Republic of
Kuwait
Kyrgyz Republic
Latvia
Lesotho
Liechtenstein
Lithuania
Luxembourg
Macao, China
Madagascar
Malawi
Malaysia
Maldives
Mali
Malta
Mauritania
Mauritius
Mexico
Moldova
Mongolia
Morocco
Mozambique
Myanmar
Namibia
Nepal
Netherlands
New Zealand
Nicaragua
Niger
Nigeria
Norway
Oman
Pakistan
Panama
Papua New Guinea
Paraguay
Peru
Philippines
Poland
Portugal
Qatar
Romania
Rwanda
Saint Kitts and Nevis
Saint Lucia
Saint Vincent & the Grenadines
Saudi Arabia
Senegal
Sierra Leone
Singapore
Slovak Republic
Slovenia
Solomon Islands
South Africa
Spain
Sri Lanka
Suriname
Swaziland
Sweden
Switzerland
Chinese Taipei
Tanzania
Thailand
Togo
Tonga
Trinidad and Tobago
Tunisia
Turkey
Uganda
Ukraine
United Arab Emirates
United Kingdom
United States of America
Uruguay
Venezuela (Bolivarian Republic of)
Viet Nam
Zambia
Zimbabwe

APPENDIX
11

International Copyright Relations of the United States of America

[U.S. Copyright Office, Circular 38A May 2010]

This publication sets forth United States copyright relations of current interest with the other independent nations of the world.

There is no such thing as an "international copyright" that will automatically protect an author's writings throughout the world. Protection against unauthorized use in a particular country depends on the national laws of that country. However, most countries offer protection to foreign works under certain conditions that have been greatly simplified by international copyright treaties and conventions. There are several such treaties and conventions affecting copyright, including the Berne Convention for the Protection of Literary and Artistic Works; the Universal Copyright Convention; the World Intellectual Property Organization (WIPO) Copyright Treaty; the WIPO Performances and Phonograms Treaty; and the Agreement on Trade-Related Aspects of Intellectual Property Rights, one of several agreements that together led to the creation of the World Trade Organization on January 1, 1995.

An author who wants copyright protection for his or her work in a particular country should first determine the extent of the protection available to works of foreign authors in that country. If possible, this should be done before the work is published anywhere, because protection may depend on the facts existing at the time of first publication.

If the country in which protection is sought is a party to one of the international copyright conventions, the work generally can be protected by complying with the conditions of that convention. Even if the work cannot be brought under an international convention, protection under the specific provisions of the country's national laws may still be possible. There are, however, some countries that offer little or no copyright protection to any foreign works. For current information on the requirements of and protection provided by other countries, it maybe advisable to consult an expert familiar with foreign copyright laws. The U.S. Copyright Office is not permitted to recommend agents or attorneys or to give legal advice on foreign laws.

Relations as of January 2010

This publication documents the countries that are parties to specific multilateral agreements or bilateral relationships. The relevant agreements are listed below, along with their abbreviations. A list of countries follows. The list indicates which agreements each country has signed and the date each agreement took effect.

Agreements

BAC Buenos Aires Convention of 1910. U.S. ratification deposited with the government of Argentina, May 1, 1911; proclaimed by the president of the United States, July 13, 1914.

Berne Berne Convention for the Protection of Literary and Artistic Works. Appearing within parentheses in the country listing that follows is the latest act of the convention to which the country is party. Thus "Berne (Paris)" means the Berne Convention as revised at Paris on July 24, 1971 (Paris Act). "Berne (Brussels)" means the convention as revised at Brussels on June 26, 1948. "Berne (Rome)" means the convention as revised at Rome on June 2, 1928 (Rome Act). Other acts of the convention were revised at Stockholm on July 14, 1967, and at Berlin on November 13, 1908. In each case, a reference to a particular act signifies adherence only to the substantive provisions of the act — for example, to articles 1 to 21 and the appendix of the Paris Act; articles 22 to 38 deal with administration and structure. The effective date for U.S. adherence to the Berne Convention is March 1, 1989. The latest act of the convention to which the United States is party is the revision done at Paris on July 24, 1971.

Bilateral Bilateral copyright relations with the United States by virtue of a proclamation or treaty. Where there is more than one proclamation or treaty, only the date of the first one is given.

None No copyright relations with the United States.

Phonograms Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Geneva, 1971. The effective date for the United States is March 10, 1974.

SAT Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, Brussels, 1974. The effective date for the United States is March 7, 1985.

UCC Geneva Universal Copyright Convention, Geneva, 1952. The effective date for the United States is September 16, 1955, the date the treaty entered into force.

UCC Paris Universal Copyright Convention as revised at Paris, 1971. The effective date for the United States is July 10, 1974, the date the treaty entered into force.

Unclear Has not established copyright relations with the United States but may be honoring obligations incurred under former political status.

WCT World Intellectual Property Organization (WIPO) Copyright Treaty, Geneva, 1996. The effective date for the United States is Mar. 6, 2002, the date the treaty entered into force.

WPPT WIPO Performances and Phonograms Treaty, Geneva, 1996. The effective date for the United States is May 20, 2002, the date the treaty entered into force.

WTO World Trade Organization (WTO), established pursuant to the Marrakesh Agreement of Apr. 15, 1994, to implement the Uruguay Round Agreements. These agreements, which include the Agreement on Trade-Related Aspects of Intellectual Property Rights, affect, among other things, intangible property rights, including copyright and other intellectual property rights. The effective date of United States membership in the WTO is Jan. 1, 1995.

Countries

Afghanistan *None*

Albania *Berne* (*Paris*) Mar. 6, 1994; *WTO* Sept. 8, 2000; *Phonograms* June 26, 2001; *WPPT* May 20, 2002; *UCC Geneva* Feb. 4, 2004; *UCC Paris* Feb. 4, 2004; *WCT* Aug. 6, 2005

Algeria *UCC Geneva* Aug. 28, 1973; *UCC Paris* July 10, 1974; *Berne* (*Paris*) Apr. 19, 1998

Andorra *UCC Geneva* Sept. 16, 1955; *Berne* (*Paris*) June 2, 2004

Angola *WTO* Nov. 23, 1996

Antigua and Barbuda *WTO* Jan. 1, 1995; *Berne* (*Paris*) Mar. 17, 2000

Argentina *Bilateral* Aug. 23, 1934; *BAC* Apr. 19, 1950; *UCC Geneva* Feb. 13, 1958; *Berne* (*Paris*) June 10, 1967; *Phonograms* June 30, 1973; *WTO* Jan. 1, 1995; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Armenia *SAT* Dec. 13, 1993; *Berne* (*Paris*) Oct. 19, 2000; *Phonograms* Jan. 31, 2003; *WTO* Feb. 5, 2003; *WCT* Mar. 6, 2005; *WPPT* Mar. 6, 2005

Australia *Bilateral* Mar. 15, 1918; *Berne* (*Paris*) Apr. 14, 1928; *UCC Geneva* May 1, 1969; *Phonograms* June 22, 1974; *UCC Paris* Feb. 29, 1978; *SAT* Oct.

26, 1990; *WTO* Jan. 1, 1995; *Bilateral Jan.* 1, 2005[1]; *WCT* July 26, 2007; *WPPT* July 26, 2007

Austria *Bilateral* Sept. 20, 1907; *Berne* (*Paris*) Oct. 1, 1920; *UCC Geneva* July 2, 1957; *SAT* Aug. 6, 1982; *UCC Paris* Aug. 14, 1982; *Phonograms* Aug. 21, 1982; *WTO* Jan. 1, 1995; *WCT* Mar. 14, 2010; *WPPT* Mar. 14, 2010

Azerbaijan[2] *UCC Geneva* Apr. 7, 1997; *Berne* (*Paris*) June 4, 1999; *Phonograms* Sept. 1, 2001; *WCT* Apr. 11, 2006; *WPPT* Apr. 11, 2006

Bahamas *Berne* (*Brussels*) July 10, 1973; *UCC Geneva* July 13, 1976; *UCC Paris* Dec. 27, 1976

Bahrain *WTO* Jan. 1, 1995; *Berne* (*Paris*) Mar. 2, 1997; *WCT* Dec. 15, 2005; *WPPT* Dec. 15, 2005; *Bilateral* Aug. 1, 2006; *SAT* May 1, 2007

Bangladesh *UCC Geneva* Aug. 5, 1975; *UCC Paris* Aug. 5, 1975; WTO Jan. 1, 1995; *Berne* (*Paris*) May 4, 1999

Barbados *UCC Geneva* June 18, 1983; *UCC* Paris June 18, 1983; *Berne* (*Paris*) July 30, 1983; *Phonograms* July 29, 1983; *WTO* Jan. 1, 1995

Belarus[2] *UCC Geneva* Mar. 29, 1994; *Berne* (*Paris*) Dec. 12, 1997; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002; *Phonograms* Apr. 17, 2003

Belgium *Berne* (*Paris*) Dec. 5, 1887; *Bilateral* July 1, 1891[3]; *UCC Geneva* Aug. 31, 1960; WTO Jan. 1, 1995; *WCT* Aug. 30, 2006; *WPPT* Aug. 30, 2006

Belize *UCC Geneva* Dec. 1, 1982; *WTO* Jan. 1, 1995; *Berne* (*Paris*) June 17, 2000

Benin *Berne* (*Paris*) Jan. 3, 1961; *WTO* Feb. 22, 1996; *WCT* Apr. 16, 2006; *WPPT* Apr. 16, 2006

Bhutan *Berne* (*Paris*) Nov. 25, 2004

Bolivia *BAC* May 15, 1914; *UCC Geneva* Mar. 22, 1990; *UCC Paris* Mar. 22, 1990; *Berne* (*Paris*) Nov. 4, 1993; WTO Sept. 12, 1995

Bosnia and Herzegovina *Berne* (*Paris*) Mar. 1, 1992; *UCC Geneva* July 12, 1993; *UCC Paris* July 12, 1993; *SAT* Jan. 12, 1994; *Phonograms* May 25, 2009; *WCT* Nov. 25, 2009; *WPPT* Nov. 25, 2009

Botswana *WTO* May 31, 1995; *Berne* (*Paris*) Apr. 15, 1998; *WCT* Jan. 27, 2005; *WPPT* Jan. 27, 2005

Brazil *BAC* Aug. 31,1915; *Berne* (*Paris*) Feb. 9, 1922; *Bilateral* Apr. 2, 1957; *UCC Geneva* Jan. 13, 1960; *Phonograms* Nov. 28, 1975; *UCC Paris* Dec. 11, 1975; *WTO* Jan. 1, 1995

Brunei *WTO* Jan. 1, 1995; *Berne* (*Paris*) Aug. 30, 2006

Bulgaria *Berne* (*Paris*) Dec. 5, 1921; *UCC Geneva* June 7, 1975; *UCC Paris* June 7, 1975; *Phonograms* Sept. 6, 1995; *WTO* Dec. 1, 1996; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Burkina Faso *Berne* (*Paris*) Aug. 19,1963; *Phonograms* Jan. 30, 1988; *WTO* June 3, 1995; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Burundi *WTO* July 23, 1995

Cambodia *UCC Geneva* Sept. 16, 1955; *WTO* Oct. 13, 2004

Cameroon *Berne* (*Paris*) Sept. 21, 1964; *UCC Geneva* May 1, 1973; *UCC Paris* July 10, 1974; *WTO* Dec. 13, 1995

Canada *Bilateral* Jan. 1, 1924; *Berne* (*Paris*) Apr. 10, 1928; *UCC Geneva* Aug. 10, 1962; *WTO* Jan. 1, 1995

Cape Verde *Berne* (*Paris*) July 7, 1997; *WTO* July 23, 2008

Central African Republic *Berne* (*Paris*) Sept. 3, 1977; *WTO* May 31, 1995

Chad *Berne* (*Brussels/Stockholm*) Nov. 25, 1971; *WTO* Oct. 19, 1996

Chile *Bilateral* May 25, 1896; *BAC* June 14, 1955; *UCC Geneva* Sept. 16, 1955; *Berne* (*Paris*) June 5, 1970; *Phonograms* Mar. 24, 1977; *WTO* Jan. 1, 1995; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002; *Bilateral* Jan. 1, 2004[4]

China *Bilateral* Jan. 13, 1904[5]; *Bilateral* Nov. 30, 1948; *Bilateral* Mar. 17, 1992[6]; *Berne* (*Paris*) Oct. 15, 1992; *UCC Geneva* Oct. 30, 1992; *UCC Paris* Oct. 30, 1992; *Phonograms* Apr. 30, 1993; *WTO* Dec. 11, 2001; *WCT* June 9, 2007; *WPPT* June 9, 2007

Chinese Taipei (Taiwan)[5] *WTO* Jan. 1, 2002

Colombia *BAC* Dec. 23, 1936; *UCC Geneva* June 18, 1976; *UCC Paris* June 18, 1976; *Berne* (*Paris*) Mar. 7, 1988; *Phonograms* May 16, 1994; *WTO* Apr. 30,1995; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Comoros *Berne* (*Paris*) Apr. 17, 2005

Congo, Democratic Republic of the *Berne* (*Paris*) Oct. 8, 1963; *WTO* Jan. 1, 1997; *Phonograms* Nov. 29, 1977

Congo, Republic of the *Berne* (*Paris*) May 8, 1962; *WTO* Mar. 27, 1997

Costa Rica[7] *Bilateral* Oct. 19, 1899; *BAC* Nov. 30, 1916; *UCC Geneva* Sept. 16, 1955; *Berne* (*Paris*) June 10, 1978; *UCC Paris* Mar. 7, 1980; *Phonograms* June 17, 1982; *WTO* Jan. 1, 1995; *SAT* June 25, 1999; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002; *Bilateral* Jan. 1, 2009[8]

Cote d'Ivoire *Berne* (*Paris*) Jan. 1, 1962; *WTO* Jan. 1, 1995

Croatia *Berne* (*Paris*) Oct. 8, 1991; *UCC Paris* July 6, 1992; *UCC Geneva* July 6, 1992; *SAT* July 26, 1993; *Phonograms Apr.* 20, 2000; *WTO* Nov. 30, 2000; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Cuba *Bilateral* Nov. 17, 1903; *BAC* May 28, 1913; *UCC Geneva* June 18, 1957; *WTO* Apr. 20, 1995; *Berne* (*Paris*) Feb. 20, 1997

Cyprus *Berne* (*Paris*) Feb. 24, 1964; *UCC Geneva* Dec. 19, 1990; *UCC Paris* Dec. 19, 1990; *Phonograms* Sept. 30, 1993; *WTO* July 30, 1995; *WCT* Nov. 4, 2003; *WPPT* Dec. 2, 2005

Czech Republic *Berne* (*Paris*) Jan. 1, 1993; *Phonograms* Jan. 1, 1993; *UCC Geneva* Mar. 26, 1993; *UCC* Paris Mar. 26, 1993; *WTO* Jan. 1, 1995; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Denmark *Bilateral* May 8,1893; *Berne* (*Paris*) July 1, 1903; *UCC Geneva* Feb. 9, 1962; *Phonograms* Mar. 24, 1977; *UCC* Paris July 11, 1979; *WTO* Jan. 1, 1995; *WCT* Mar. 14, 2010; *WPPT* Mar. 14, 2010

Djibouti *WTO* May 31, 1995; *Berne* (*Paris*) May 13, 2002

Dominica *WTO* Jan. 1, 1995; *Berne* (*Paris*) Aug. 7, 1999

Dominican Republic[7] *BAC* Oct. 31, 1912; *UCC Geneva* May 8, 1983; *UCC Paris* May 8, 1983; *WTO* Mar. 9, 1995; *Berne* (*Paris*) Dec. 24, 1997; *WCT* Jan. 10, 2006; *WPPT* Jan. 10, 2006; *Bilateral* Jan. 1, 2007[8]

Ecuador *BAC* Aug. 31, 1914; *UCC Geneva* June 5,1957; *Phonograms* Sept. 14, 1974; *UCC Paris* Sept. 6, 1991; *Berne* (*Paris*) Oct. 9, 1991; *WTO* Jan. 21, 1996; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Egypt *Berne* (*Paris*) June 7, 1977; *Phonograms* Apr. 23, 1978; *WTO* June 30, 1995

El Salvador *Bilateral* June 30,1908[9]; *Phonograms* Feb. 9, 1979; *UCC Geneva* Mar. 29, 1979; *UCC Paris* Mar. 29,1979; *Berne* (*Paris*) Feb. 19, 1994; *WTO* May 7, 1995; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002; *Bilateral* Mar. 1, 2006[8]; *SAT* July 22, 2008

Equatorial Guinea *Berne* (*Paris*) June 26, 1997

Eritrea *None*

Estonia *Berne* (*Paris*) Oct. 26, 1994; *WTO* Nov. 13, 1999; *Phonograms* May 28, 2000; *WCT* Mar. 14, 2010; *WPPT* Mar. 14, 2010

Ethiopia *None*

European Community *WTO* Jan. 1, 1995; *WCT* Mar. 14, 2010; *WPPT* Mar. 14, 2010

Fiji *Berne* (*Brussels*) Dec. 1, 1971; *UCC Geneva* Dec. 13, 1971; *Phonograms* Apr. 18, 1973; *WTO* Jan. 14, 1996

Finland *Berne* (*Paris*) Apr. 1, 1928; *Bilateral* Jan. 1, 1929; *UCC Geneva* Apr. 16, 1963; *Phonograms* Apr. 18, 1973; *UCC* Paris Nov. 1, 1986; *WTO* Jan. 1, 1995; *WCT* Mar. 14, 2010; *WPPT* Mar. 14, 2010

France *Berne* (*Paris*) Dec. 5, 1887; *Bilateral* July 1, 1891[3]; *UCC Geneva* Jan. 14, 1956; *Phonograms* Apr. 18, 1973; *UCC Paris* July 10, 1974; *WTO* Jan. 1, 1995; *WCT* Mar. 14, 2010; *WPPT* Mar. 14, 2010

Gabon *Berne* (*Paris*) Mar. 26, 1962; *WTO* Jan. 1, 1995; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Gambia *Berne* (*Paris*) Mar. 7, 1993; *WTO* Oct. 23, 1996

Georgia *Berne* (*Paris*) May 16, 1995; *WTO* June 14, 2000; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Germany[10] *Berne* (*Paris*) Dec. 5, 1887[11]; *Bilateral* Apr. 15, 1892; *UCC Geneva* Sept. 16, 1955; *Bilateral* July 12, 1967[12]; *Phonograms* May 18, 1974; *UCC Paris* July 10, 1974; *SAT* Aug. 25, 1979; *WTO* Jan. 1, 1995; *WCT* Mar. 14, 2010; *WPPT* Mar. 14, 2010

Ghana *UCC Geneva* Aug. 22, 1962; *Berne* (*Paris*) Oct. 11, 1991; *WTO* Jan. 1, 1995; *WCT* Nov. 18, 2006

Greece *Berne* (*Paris*) Nov. 9, 1920; *Bilateral* Mar. 1, 1932; *UCC Geneva* Aug. 24, 1963; *SAT* Oct. 22, 1991; *Phonograms* Feb. 9, 1994; *WTO* Jan. 1, 1995; *WCT* Mar. 14, 2010; *WPPT* Mar. 14, 2010

Grenada *WTO* Feb. 22, 1996; *Berne* (*Paris*) Sept. 22, 1998

Guatemala[7] *BAC* Mar. 28, 1913; *UCC Geneva* Oct. 28, 1964; *Phonograms* Feb. 1,1977; *WTO* July 21, 1995; *Berne* (*Paris*) July 28, 1997; *WPPT* Jan. 8, 2003; *WCT* Feb. 4, 2003; *Bilateral* July 1, 2006[8]

Guinea *Berne* (*Paris*) Nov. 20, 1980; *UCC Geneva* Nov. 13, 1981; *UCC Paris* Nov. 13, 1981; *WTO* Oct. 25, 1995; *WCT* May 25, 2002; *WPPT* May 25, 2002

Guinea-Bissau *Berne* (*Paris*) July 22, 1991; *WTO* May 31, 1995

Guyana *Berne* (*Paris*) Oct. 25, 1994; *WTO* Jan. 1, 1995

Haiti *BAC* Nov. 27, 1919; *UCC Geneva* Sept. 16, 1955; *Berne* (*Paris*) Jan. 11, 1996; *WTO* Jan. 30, 1996

Holy See *Berne* (*Paris*) Sept. 12, 1935; *UCC Geneva* Oct. 5, 1955; *Phonograms* July 18, 1977; *UCC Paris* May 6, 1980

Honduras[7] *BAC* Apr. 27, 1914; *Berne* (*Paris*) Jan. 25, 1990; *Phonograms* Mar. 6, 1990; *WTO* Jan. 1, 1995; *WCT* May 20, 2002; *WPPT* May 20, 2002; *Bilateral* Apr. 1, 2006[8]; *SAT* Apr. 7, 2008

Hong Kong[13] *WTO* Jan. 1, 1995; *Berne* (*Paris*) July 1, 1997; *Phonograms* July 1, 1997

Hungary *Bilateral* Oct. 16, 1912; *Berne* (*Paris*) Feb. 14, 1922; *UCC Geneva* Jan. 23, 1971; *UCC Paris* July 10, 1974; *Phonograms* May 28, 1975; *WTO* Jan. 1, 1995; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Iceland *Berne* (*Paris*) Sept. 7, 1947; *UCC Geneva* Dec. 18, 1956; *WTO* Jan. 1, 1995

India *Berne* (*Paris*) Apr. 1,1928; *Bilateral* Aug. 15, 1947; *UCC Geneva* Jan. 21, 1958; *Phonograms* Feb. 12, 1975; *UCC Paris* Apr. 7, 1988; *WTO* Jan. 1, 1995

Indonesia *Bilateral* Aug. 1, 1989; *WTO* Jan. 1, 1995; *Berne* (*Paris*) Sept. 5, 1997; *WCT* Mar. 6, 2002; *WPPT* Feb. 15, 2005

Iran *None*

Iraq *None*

Ireland *Berne* (*Paris*) Oct. 5,1927; *Bilateral* Oct. 1, 1929; *UCC Geneva* Jan. 20, 1959; *WTO* Jan. 1, 1995; *WCT* Mar. 14, 2010; *WPPT* Mar. 14, 2010

Israel *Bilateral May* 15, 1948; *Berne* (*Paris*) Mar. 24, 1950; *UCC Geneva* Sept. 16, 1955; *Phonograms* May 1, 1978; *Bilateral* Sept. 1, 1985; *WTO* Apr. 21, 1995

Italy *Berne* (*Paris*) Dec. 5, 1887; *Bilateral* Oct. 31, 1892; *Bilateral* May 1, 1915; *UCC Geneva* Jan. 24, 1957; *Phonograms* Mar. 24, 1977; *UCC Paris* Jan. 25, 1980; *SAT* July 7, 1981; *WTO* Jan. 1, 1995; *WCT* Mar. 14, 2010; *WPPT* Mar. 14, 2010

Jamaica *Berne* (*Paris*) Jan. 1,1994; *Phonograms* Jan. 11, 1994; *WTO* Mar. 9, 1995; *SAT* Jan. 12, 2000; *WCT* June 12, 2002; *WPPT* June 12, 2002

Japan[14] *Berne* (*Paris*) July 15, 1899; *Bilateral* May 10, 1906; *UCC Geneva* Apr. 28, 1956; *UCC Paris* Oct. 21, 1977; *Phonograms* Oct. 14, 1978; *WTO* Jan. 1, 1995; *WCT* Mar. 6, 2002; *WPPT* Oct. 9, 2002

Jordan *Berne* (*Paris*) July 28, 1999; *WTO* Apr. 11, 2000; *Bilateral* Dec. 17, 2001[15]; *WCT* Apr. 27, 2004; *WPPT* May 24, 2004

Kazakhstan[2] *UCC Geneva* Aug. 6, 1992; *Berne* (*Paris*) Apr. 12, 1999; *Phonograms* Aug. 3, 2001; *WCT* Nov. 12, 2004; *WPPT* Nov. 12, 2004

Kenya *UCC Geneva* Sept. 7, 1966; *UCC Paris* July 10, 1974; *Phonograms* Apr. 21, 1976; *SAT* Aug. 25, 1979; *Berne* (*Paris*) June 11, 1993; *WTO* Jan. 1, 1995

Kiribati *Unclear*

Korea, North *Berne* (*Paris*) Apr. 28, 2003

Korea, South *UCC Geneva* Oct. 1, 1987; *UCC Paris* Oct. 1, 1987; *Phonograms* Oct. 10, 1987; *WTO* Jan. 1, 1995; *Berne* (*Paris*) Aug. 21, 1996; *WCT* June 24, 2004; *WPPT* Mar. 18, 2009

Kuwait *WTO* Jan. 1, 1995

Kyrgyz Republic *WTO* Dec. 20, 1998; *Berne* (*Paris*) July 8, 1999; *WCT* Mar. 6, 2002; *WPPT* Aug. 15, 2002; *Phonograms* Oct. 12, 2002

Laos *UCC Geneva* Sept. 16, 1955

Latvia *Berne* (*Paris*) Aug. 11, 1995; *Phonograms* Aug. 23, 1997; *WTO* Feb. 10, 1999; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Lebanon *Berne* (*Rome*) Sept. 30, 1947; *UCC Geneva* Oct. 17, 1959

Lesotho *Berne* (*Paris*) Sept. 28, 1989; *WTO* May 31, 1995

Liberia *UCC Geneva* July 27, 1956; *Berne* (*Paris*) Mar. 8, 1989; *Phonograms* Dec. 16, 2005

Libya *Berne* (*Paris*) Sept. 28, 1976

Liechtenstein *Berne* (*Paris*) July 30, 1931; *UCC Geneva* Jan. 22, 1959; *WTO* Sept. 1, 1995; *Phonograms* Oct. 12, 1999; *UCC Paris* Nov. 11, 1999; *WCT* Apr. 30, 2007; *WPPT* Apr. 30, 2007

Lithuania *Berne* (*Paris*) Dec. 14, 1994; *Phonograms* Jan. 27, 2000; *WTO* May 31, 2001; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Luxembourg *Berne* (*Paris*) June 20, 1888; *Bilateral* (*two*) June 29, 1910; *UCC Geneva* Oct. 15, 1955; *Phonograms* Mar. 8, 1976; *WTO* Jan. 1, 1995; *WCT* Mar. 14, 2010; *WPPT* Mar. 14, 2010

Macau *WTO* Jan. 1, 1995

Macedonia, Former Yugoslav Republic of *Berne* (*Paris*) Sept. 8, 1991; *SAT* Sept. 2, 1977; *UCC Geneva* Apr. 30, 1997; *UCC Paris* Apr. 30, 1997; *Phonograms* Mar. 2, 1998; *WTO* Apr. 4, 2003; *WCT* Feb. 4, 2004; *WPPT* Mar. 20, 2005

Madagascar *Berne* (*Brussels*) *Jan*. 1, 1966; *WTO* Nov. 17, 1995

Malawi *UCC Geneva* Oct. 26, 1965; *Berne* (*Paris*) Oct. 12, 1991; *WTO* May 31, 1995

Malaysia *Berne* (*Paris*) Oct. 1, 1990; *WTO* Jan. 1, 1995

Maldives *WTO* May 31, 1995

Mali *Berne* (*Rome*) Mar. 19, 1962; *WTO* May 31, 1995; *WCT* Apr. 24, 2002; *WPPT* May 20, 2002

Malta *Berne* (*Rome*) Sept. 21, 1964; *UCC Geneva* Nov. 19, 1968; *WTO* Jan. 1, 1995; *WCT* Mar. 14, 2010; *WPPT Mar.* 14, 2010

Mauritania *Berne* (*Paris*) Feb. 6, 1973; *WTO* May 31, 1995

Mauritius *UCC Geneva* Aug. 20, 1970; *Berne* (*Paris*) May 10, 1989; *WTO* Jan. 1, 1995

Mexico *Bilateral* Feb. 27, 1896; *UCC Geneva* May 12, 1957; *BAC* Apr. 24, 1964; *Berne* (*Paris*) June 11, 1967; *Phonograms* Dec. 21, 1973; *UCC Paris* Oct. 31, 1975; *SAT* Aug. 25, 1979; *WTO* Jan. 1, 1995; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Micronesia, Federated States of *Berne* (*Paris*) Oct. 7, 2003

Moldova[2] *UCC Geneva* June 23, 1997; *Berne* (*Paris*) Nov. 2, 1995; *Phonograms* July 17, 2000; *WTO* July 26, 2001; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002; *SAT* Oct. 28, 2008

Monaco *Berne* (*Paris*) May 30, 1889; *Bilateral* Oct. 15, 1952; *UCC Geneva* Sept. 16, 1955; *Phonograms* Dec. 2, 1974; *UCC* Paris Dec. 13, 1974

Mongolia *WTO* Jan. 29, 1997; *Berne* (*Paris*) Mar. 12, 1998; *WCT* Oct. 25, 2002; *WPPT* Oct. 25, 2002

Montenegro *Berne* (*Paris*) June 3, 2006; *Phonograms* June 3, 2006; *WCT* June 3, 2006; *WPPT* June 3, 2006; *SAT* Oct. 23, 2006; *UCC Geneva* Apr. 26, 2007; *UCC Paris* Apr. 26, 2007

Morocco *Berne* (*Paris*) June 16, 1917; *UCC Geneva* May 8, 1972; *UCC Paris* Jan. 28, 1976; *SAT* June 30, 1983; *WTO* Jan. 1, 1995; *Bilateral* Jan. 1, 2006

Mozambique *WTO* Aug. 26, 1995

Myanmar, Union of *WTO* Jan. 1, 1995

Namibia *Berne* (*Paris*) Mar. 21, 1990; *WTO* Jan. 1, 1995

Nauru *Unclear*

Nepal *WTO* Apr. 23, 2004; *Berne* (*Paris*) Jan. 11, 2006

Netherlands and Possessions *Bilateral* Nov. 20, 1899; *Berne* (*Paris*) Nov. 1, 1912; *UCC Geneva* June 22, 1967; *UCC Paris* Nov. 30, 1985; *Phonograms* Oct. 12, 1993; *WTO* Jan. 1, 1995; *WCT* Mar. 14, 2010; *WPPT* Mar. 14, 2010

New Zealand *Bilateral* Dec. 1, 1916; *Berne* (*Rome*) Apr. 24, 1928; *UCC Geneva* Sept. 11, 1964; *Phonograms* Aug. 13, 1976; *WTO* Jan. 1,1995

Nicaragua[7] *BAC* Dec. 15, 1913; *UCC Geneva* Aug. 16, 1961; *SAT* Aug. 25, 1979; *WTO* Sept. 3, 1995; *Phonograms* Aug. 10, 2000; *Berne* (*Paris*) Aug. 23, 2000; *WCT* Mar. 6, 2003; *WPPT* Mar. 6, 2003; *Bilateral* Apr. 1, 2006[8]

Niger *Berne* (*Paris*) May 2, 1962; *UCC Geneva* May 15, 1989; *UCC Paris* May 15, 1989; *WTO* Dec. 13, 1996

Nigeria *UCC Geneva* Feb. 14, 1962; *Berne* (*Paris*) Sept. 14, 1993; *WTO* Jan. 1, 1995

Norway *Berne* (*Paris*) Apr. 13, 1896; *Bilateral* July 1, 1905; *UCC Geneva* Jan. 23, 1963; *UCC* Paris Aug. 7, 1974; *Phonograms* Aug. 1, 1978; *WTO* Jan. 1, 1995

Oman *Berne* (*Paris*) July 14, 1999; *WTO* Nov. 9, 2000; *WCT* Sept. 20, 2005; *WPPT* Sept. 20, 2005; *SAT* Mar. 18, 2008

Pakistan *Berne* (*Rome*) July 5, 1948; *UCC Geneva* Sept. 16, 1955; *WTO* Jan. 1, 1995

Palau *Unclear*

Panama *BAC* Nov. 25, 1913; *UCC Geneva* Oct. 17, 1962; *Phonograms* June 29, 1974; *UCC Paris* Sept. 3, 1980; *SAT* Sept. 25, 1985; *Berne* (*Paris*) June 8, 1996; *WTO* Sept. 6, 1997; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Papua New Guinea *WTO* June 9, 1996

Paraguay *BAC* Sept. 20, 1917; *UCC Geneva* Mar. 11, 1962; *Phonograms* Feb. 13, 1979; *Berne* (*Paris*) Jan. 2, 1992; *WTO* Jan. 1, 1995; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Peru *BAC* Apr. 30, 1920; *UCC Geneva* Oct. 16, 1963; *UCC Paris* July 22, 1985; *SAT* Aug. 7, 1985; *Phonograms* Aug. 24, 1985; *Berne* (*Paris*) Aug. 20, 1988; *WTO* Jan. 1, 1995; *WCT* Mar. 6, 2002; *WPPT* July 18, 2002

Philippines *Bilateral* Oct. 21, 1948; *Berne* (*Paris*) Aug. 1, 1951; *WTO* Jan. 1, 1995; *WCT* Oct. 4, 2002; *WPPT* Oct. 4, 2002

Poland *Berne* (*Paris*) Jan. 28, 1920; *Bilateral* Feb. 16, 1927; *UCC Geneva* Mar. 9, 1977; *UCC Paris* Mar. 9, 1977; *WTO* July 1, 1995; *WPPT* Oct. 21, 2003; *WCT* Mar. 23, 2004

Portugal *Bilateral* July 20, 1893; *Berne* (*Paris*) Mar. 29, 1911; *UCC Geneva* Dec. 25, 1956; *UCC Paris* July 30, 1981; *WTO* Jan. 1, 1995; *SAT* Mar. 11, 1996; *WCT* Mar. 14, 2010; *WPPT* Mar. 14, 2010

Qatar *WTO* Jan. 13, 1996; *Berne* (*Paris*) July 5, 2000; *WCT* Oct. 28, 2005; *WPPT* Oct. 28, 2005

Romania *Berne* (*Paris*) Jan. 1, 1927; *Bilateral* May 14, 1928; *WTO* Jan. 1, 1995; *Phonograms* Oct. 1, 1998; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Russia[2] *UCC Geneva* May 27, 1973; *SAT* Jan. 20, 1989; *UCC Paris* Mar. 9, 1995; *Berne* (*Paris*) Mar. 13, 1995; *Phonograms* Mar. 13, 1995; *WCT* Feb. 5, 2009; *WPPT* Feb. 5, 2009

Rwanda *Berne* (*Paris*) Mar. 1, 1984; *UCC Geneva* Nov. 10, 1989; *UCC Paris* Nov. 10, 1989; *WTO* May 22, 1996; *SAT* July 25, 2001

Saint Kitts and Nevis *Berne* (*Paris*) Apr. 9, 1995; *WTO* Feb. 21,1996

Saint Lucia *Berne* (*Paris*) Aug. 24, 1993; *WTO* Jan. 1, 1995; *Phonograms* Apr. 2, 2001; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Saint Vincent and Grenadines *UCC Geneva* Jan. 22, 1985; *UCC Paris* Jan. 22, 1985; *WTO* Jan. 1, 1995; *Berne* (*Paris*) Aug. 29, 995

Samoa *Berne* (*Paris*) July 21, 2006

San Marino *None*

São Tomé and Principe *Unclear*

Saudi Arabia *UCC Geneva* July 13, 1994; *UCC Paris* July 13, 1994; *Berne* (*Paris*) Mar. 11, 2004; *WTO* Dec. 11, 2005

Senegal *Berne* (*Paris*) Aug. 25, 1962; *UCC Geneva* July 9, 1974; *UCC Paris* July 10, 1974; *WTO* Jan. 1, 1995; *WCT* May 18, 2002; *WPPT* May 20, 2002

Serbia *Berne* (*Paris*) Apr. 27, 1992; *SAT* Mar. 12, 2001; *UCC Paris* Sept. 11, 2001; *UCC Geneva* Nov. 11, 2001; *Phonograms* June 10, 2003; *WCT* June 13, 2003; *WPPT* June 13, 2003

Seychelles *Unclear*

Sierra Leone *WTO* July 23, 1995

Singapore *Bilateral* May 18, 1987; *WTO* Jan. 1, 1995; *Berne* (*Paris*) Dec. 21, 1998; *Bilateral* Jan. 1, 2004; *WCT* Apr. 17, 2005; *WPPT* Apr. 17, 2005; *SAT* Apr. 27, 2005

Slovakia *Berne* (*Paris*) Jan. 1, 1993; *Phonograms* Jan. 1, 1993; *UCC Geneva* Mar. 31, 1993; *UCC Paris* Mar. 31, 1993; *WTO* Jan. 1, 1995; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Slovenia *Berne* (*Paris*) June 25, 1991; *SAT* Nov. 3, 1992; *UCC* Geneva Nov. 5, 1992; *UCC Paris* Nov. 5, 1992; *WTO* July 30, 1995; *Phonograms* Oct. 15, 1996; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002

Solomon Islands *WTO* July 26, 1996

Somalia *Unclear*

South Africa *Bilateral* July 1, 1924; *Berne* (*Brussels*) Oct. 3, 1928; *WTO* Jan. 1, 1995

Spain *Berne* (*Paris*) Dec. 5, 1887; *Bilateral* July 10, 1895; *UCC Geneva* Sept. 16, 1955; *UCC Paris* July 10, 1974; *Phonograms* Aug. 24, 1974; *WTO* Jan. 1, 1995; *WCT* Mar. 14, 2010; *WPPT* Mar. 14, 2010

Sri Lanka *Berne* (*Rome*) July 20, 1959; *UCC Geneva* Jan. 25, 1984; *UCC Paris* Jan. 25, 1984; *WTO* Jan. 1, 1995

Sudan *Berne* (*Paris*) Dec. 28, 2000

Suriname *Berne* (*Paris*) Feb. 23, 1977; *WTO* Jan. 1, 1995

Swaziland *WTO* Jan. 1, 1995; *Berne* (*Paris*) Dec. 14, 1998

Sweden *Berne* (*Paris*) Aug. 1, 1904; *Bilateral* June 1, 1911; *UCC Geneva* July 1, 1961; *Phonograms* Apr. 18, 1973; *UCC Paris* July 10, 1974; *WTO* Jan. 1, 1995; *WCT* Mar. 14, 2010; *WPPT* Mar. 14, 2010

Switzerland *Berne* (*Paris*) Dec. 5, 1887; *Bilateral* July 1, 1891[3]; *UCC Geneva* Mar. 30, 1956; *UCC Paris* Sept. 21, 1993; *SAT* Sept. 24, 1993; *Phonograms* Sept. 30, 1993; *WTO* July 1, 1995; *WCT* July 1, 2008; *WPPT* July 1, 2008

Syria *Berne* (*Paris*) June 11, 2004

Tajikistan[2] *UCC Geneva* Aug. 28, 1992; *Berne* (*Paris*) Mar. 9, 2000; *WCT* Apr. 5, 2009

Tanzania *Berne* (*Paris*) July 25, 1994; *WTO* Jan. 1, 1995

Thailand *Bilateral* Sept. 1, 1921; *Berne* (*Paris*) July 17, 1931; *Bilateral* June 8, 1968; *WTO* Jan. 1, 1995

Togo *Berne* (*Paris*) Apr. 30, 1975; *WTO* May 31, 1995; *WCT* May 21, 2003; *WPPT* May 21, 2003; *UCC Geneva* May 28, 2003; *UCC* Paris May 28, 2003; *Phonograms* June 10, 2003; *SAT* June 10, 2003

Tonga *Berne* (*Paris*) June 14, 2001; *WTO* July 27, 2007

Trinidad and Tobago *Berne* (*Paris*) Aug. 16, 1988; *UCC Geneva* Aug. 19, 1988; *UCC Paris* Aug. 19, 1988; *Phonograms* Oct. 1, 1988; *WTO* Mar. 1, 1995; *SAT* Nov. 1, 1996; *WCT* Nov. 28, 2008; *WPPT* Nov. 28, 2008

Tunisia *Berne* (*Paris*) Dec. 5, 1887; *UCC Geneva* June 19, 1969; *UCC Paris* June 10, 1975; *WTO* Mar. 29, 1995

Turkey *Berne* (*Paris*) Jan. 1, 1952; *WTO* Mar. 26, 1995; *WCT* Nov. 28, 2008; *WPPT* Nov. 28, 2008

Turkmenistan *None*

Tuvalu *Unclear*

Uganda *WTO* Jan. 1, 1995

Ukraine[2] *UCC Geneva* Jan. 17, 1994; *Berne* (*Paris*) Oct. 25, 1995; *Phonograms* Feb. 18, 2000; *WCT* Mar. 6, 2002; *WPPT* May 20, 2002; *WTO* May 16, 2008

United Arab Emirates *WTO* Apr. 10, 1996; *Berne* (*Paris*) July 14, 2004; *WCT* July 14, 2004; *WPPT* June 9, 2005

United Kingdom *Berne* (*Paris*) Dec. 5, 1887; *Bilateral* July 1, 1891[3]; *UCC Geneva* Sept. 27, 1957; *Phonograms* Apr. 18, 1973; *UCC Paris* July 10, 1974; *WTO* Jan. 1, 1995; *WCT* Mar. 14, 2010; *WPPT* Mar. 14, 2010

Uruguay *BAC* Mar. 18, 1920; *Berne* (*Paris*) July 10, 1967; *Phonograms* Jan. 18, 1983; *UCC Geneva* Apr. 12, 1993; *UCC Paris* Apr. 12, 1993; *WTO* Jan. 1, 1995; *WPPT* Aug. 28, 2008; *WCT* June 5,2009

Uzbekistan *Berne* (*Paris*) Apr. 19, 2005

Vanuatu *Unclear*

Venezuela *UCC Geneva* Sept. 30, 1966; *Phonograms* Nov. 18, 1982; *Berne* (*Paris*) Dec. 30, 1982; *WTO* Jan. 1, 1995; *UCC Paris* Apr. 11, 1996

Vietnam *Bilateral* Dec. 23,1998[16]*; Bilateral* Dec. 10, 2001; *Berne* (*Paris*) Oct. 26, 2004; *Phonograms* July 6, 2005; *SAT* Jan. 12, 2006; *WTO* Jan. 11, 2007

Yemen *Berne* (*Paris*) July 14, 2008

Zambia *UCC Geneva* June 1, 1965; *Berne* (*Paris*) Jan. 2, 1992; *WTO* Jan. 1, 1995

Zimbabwe Berne (*Rome*) Apr. 18, 1980; *WTO* Mar. 5, 1995

Statutory Provisions

Section 104 of title 17 of the *United States Code,* which pertains to the national origin of works receiving U.S. copyright protection, is reprinted below.

§ 104. Subject matter of copyright: National origin

(a) Unpublished Works. —The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

(b) Published Works. —The works specified by sections 102 and 103, when published, are subject to protection under this title if—
  (1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a treaty party, or is a stateless person, wherever that person maybe domiciled; or
  (2) the work is first published in the United States or in a foreign nation that, on the date of first publication, is a treaty party; or
  (3) the work is a sound recording that was first fixed in a treaty party; or
  (4) the work is a pictorial, graphic, or sculptural work that is incorporated in a building or other structure, or an architectural work that is embodied in a building and the building or structure is located in the United States or a treaty party; or
  (5) the work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States; or
  (6) the work comes within the scope of a presidential proclamation. Whenever the president finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States or to works that are first published in the United States, copyright protection on substantially the same basis as that on which the foreign nation extends protection to works of its own nationals and domiciliaries and works first published in that nation, the president may by proclamation extend protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation, or which was first published in that nation. The president may revise, suspend, or revoke any such proclamation or impose any conditions or limitations on protection under a proclamation.

For purposes of paragraph (2), a work that is published in the United States or a treaty party within 30 days after publication in a foreign nation that is not a treaty party shall be considered to be first published in the United States or such treaty party, as the case may be.

(c) Effect of Berne Convention. —No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other federal or state statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.

(d) Effect of Phonograms Treaties. —Notwithstanding the provisions of subsection (b), no works other than sound recordings shall be eligible for protection under this title solely by virtue of the adherence of the

United States to the Geneva Phonograms Convention or the WIPO Performances and Phonograms Treaty.

Notes

1. Bilateral copyright relations between Australia and the United States were further developed pursuant to the Agreement between the *United States of America and Government of Australia on the Establishment of a Free Trade Area,* signed May 18, 2004, and effective Jan. 1, 2005.
2. Each of the Commonwealth of Independent States (CIS) countries listed in this circular is a successor to the Soviet Union's copyright treaty obligations, in particular those under UCC Geneva; accordingly, each is a member of UCC Geneva effective May 27, 1973, the date the Soviet Union became a party. The successor status of each country was confirmed in a bilateral trade agreement between each country and the United States, effective on the following dates: Armenia (Apr. 2, 1992); Azerbaijan (Apr. 21, 1995); Belarus (Feb. 16, 1993); Georgia (Aug. 13, 1993); Kazakhstan (Feb. 18, 1993); Kyrgyz Republic (Aug. 21, 1992); Moldova (July 2, 1992); Russia (June 17, 1992); Tajikistan (Nov. 24, 1993); Turkmenistan (Oct. 25, 1993); Ukraine (June 23, 1992); Uzbekistan (Jan. 13, 1994). However, only the countries listed in this circular as parties to the UCC have filed notices of succession with the United Nations Educational, Scientific, and Cultural Organization, which administers UCC Geneva. The notices of succession are effective on the dates specified.
3. Bilateral copyright relations between the United States and Belgium, France, the United Kingdom, and Switzerland were established by Presidential Proclamation No. 3. of July 1, 1891, 27 Stat. 981 (1891), effective that same date, under the authority of the Chase Act of 1891.
4. Bilateral copyright relations between Chile and the United States were further developed pursuant to the *Agreement between the United States of America and the Republic of Chile on the Establishment of a Free Trade Area,* signed June 6, 2003, and effective Jan. 1, 2004.
5. The government of the People's Republic of China views this treaty as not binding. In the territory administered by the authorities on Taiwan, the treaty is considered to be in force.
6. Bilateral copyright relations between the People's Republic of China and the United States of America were established, effective Mar. 17, 1992, by a presidential proclamation of the same date, under the authority of section 104 of title 17 of the *United States Code,* as amended on Oct. 31, 1988 (Public Law 100-568, 102 Stat. 2853, 2855).

7. This country became a party to the Mexico City Convention, 1902, effective June 30, 1908, to which the United States also became a party, effective on the same date. As regards copyright relations with the United States, this convention is considered to have been superseded by adherence of this country and the United States to the Buenos Aires Convention of 1910.
8. Bilaterial copyright relations between the United States and Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua were further developed pursuant to the Dominican Republic-Central American Free Trade Agreement (CAFTA-DR). All countries signed CAFTA-DR on Aug. 5, 2004. CAFTA-DR entered into force for each country on the dates specified in this circular.
9. This country became a party to the Mexico City Convention, 1902, effective June 30, 1908, to which the United States also became a party, effective on the same date.
10. The dates of adherence by Germany to multilateral treaties include adherence by the Federal Republic of Germany when that country was divided into the Federal Republic of Germany and the German Democratic Republic. However, through the accession, effective Oct. 3, 1990, of the German Democratic Republic to the Federal Republic of Germany, in accordance with the German Unification Treaty of Aug. 31, 1990, the German Democratic Republic ceased, on the said date, to be a sovereign state. Previously, the German Democratic Republic had become party to the Paris Act of the Berne Convention for the Protection of Literary and Artistic Works on Feb. 18, 1978, but ceased to be a party to the said convention on Oct. 3, 1990. The German Democratic Republic had also been a member of the Universal Copyright Convention, having become party to the Geneva text of the convention on Oct. 5, 1973, and party to the revised Paris text of the same convention on Dec. 10, 1980.
11. Date on which the accession by the German Empire became effective.
12. Bilateral copyright relations between the United States and Germany were established effective July 12, 1967, by Presidential Proclamation No. 3792 of that same date, at 32 FR 10341, under the authority of the Copyright Act of 1909 as amended at 55 Stat. 732.
13. Prior to the return of Hong Kong to China, bilateral copyright relations existed with Hong Kong through the United Kingdom (from Aug. 1, 1973), and Phonogram Convention Membership existed through the United Kingdom (from Mar. 4, 1975).
14. Bilateral copyright relations between Japan and the United States, which were formulated effective May 10, 1906, are considered to have been abrogated and superseded by the adherence of Japan to the UCC Geneva, effective Apr. 28, 1956.

15. Bilateral copyright relations between Jordan and the United States were established pursuant to the *Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area,* signed Oct. 24, 2000, and effective Dec. 17, 2001.
16. Bilateral copyright relations between the Socialist Republic of Vietnam and the United States were established effective December 23, 1998, by Presidential Proclamation No. 7161 of that same date, at 63 FR 71571 (1998), under the authority of sections 104(b)(5) and 104A(g) of title 17 of the *United States Code,* as amended.

Bibliography

This bibliography gives the full reference of all works that are cited more than once in the book and that are given a short form reference in the notes. Works which are only cited once are given a full citation in the relevant note and are not included in the bibliography.

Beier & Schricker 1996

Beier, Friedrich-Karl, and Gerhard Schricker (eds.) *From GATT to TRIPs: The Agreement on Trade-Related Aspects of Intellectual Property Rights*. IIC Studies Volume 18. Weinheim: VCH, 1996.

Benabou 2008

Benabou, Valérie Laure. "Letter from France." *R.I.D.A.* 215 (2008): 154–258.

Bercovitz 1996

Bercovitz, Alberto. "Ownership of the Intellectual Property Rights in Audiovisual Works: The Legislative Position. General Report II." In *Audiovisual Works and Literary and Artistic Property, ALAI Congrès du Premier siècle du cinema* (Paris, Unesco, 17–22 September 1995). Paris: ALAI, 1996.

Bogsch 1959

Bogsch, Arpad. *Protection of Works of Foreign Origin*. U.S. Copyright Office, Study No. 32, 1959.

Bogsch 1968

Bogsch, Arpad. *The Law of Copyright Under the Universal Convention*. 3rd rev. ed. Leyden: A. W. Sijthoff; New York: R. R. Bowker, 1968.

Boytha 1991

Boytha, György. "National Legislation on Authors' Contracts in Countries Following Continental European Legal Traditions." *Copyright* 27 (1991): 198–211.

Bradley 1997

Bradley, Curtis A. "Territorial Intellectual Property Rights in an Age of Globalism." *Va. J. Int'l L.* 37 (1997): 505–585.

Burger 1988
Burger, Peter F. "The New Photocopy Remuneration Provisions in the Federal Republic of Germany and Their Application to Foreign Authors under International Copyright Law." *I.I.C.* 19 (1988): 319–336, 488–514.

Burrell & Weatherhall 2008
Burrell, Robert, and Kimberlee Weatherall. "Exporting Controversy? Reactions to the Copyright Provisions of the U.S.-Australia Free Trade Agreement: Lessons for U.S. Trade Policy." *U. Ill. J.L. Tech. & Pol'y* 2 (2008): 259–319.

Caron 1998
Caron, Christophe. "Abuse of Rights and Authors' Rights (1)." *R.I.D.A.* 176 (1998): 2–80.

Cherpillod 1994
Cherpillod, Ivan. "News From Switzerland." *R.I.D.A.* 160 (1994): 132–192.

Cornish 1996
Cornish, William R. *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*. 3rd ed. London: Sweet and Maxwell, 1996.

Cornish 1996a
Cornish, William R. "Intellectual Property Infringement and Private International Law: Changing the Common Law Approach." *G.R.U.R. Int.* 4 (1996): 285–289.

Czarnota & Hart 1991
Czarnota, Bridget, and Robert Hart. *Legal Protection of Computer Programs in Europe: A Guide to the E.C. Directive*. London: Butterworths, 1991.

Derclaye 2009
Derclaye, Estelle (ed.). *Research Handbook on the Future of EU Copyright*. Cheltenham: Elgar, 2009.

Dietz 1993
Dietz, Adolf. "Legal Principles of Moral Rights in Civil Law Countries." *Copyright Reporter* 11 (1993): 1–18.

Dietz 1993a
Dietz, Adolf. "The Concept of Author under the Berne Convention." *R.I.D.A.* 155 (1993): 2–56.

Dietz 1998
Dietz, Adolf. "News from Germany." *R.I.D.A.* 175 (1998): 96–218.

Dietz 2003
Dietz, Adolf. "News from Germany." *R.I.D.A.* 198 (2003): 146–254.

Dietz 2007
Dietz, Adolf. "Constitutional and Quasi-Constitutional Clauses for Justification of Authors' Rights (Copyright) – From Past to Future." In *Exploring the Sources of Copyright – Proceedings of the ALAI Congress 2005*. Paris: ALAI, 2007.

Dillenz 1990
Dillenz, Walter. "The Remuneration for Home Taping and the Principle of National Treatment." 26 *Copyright* (1990): 186–201.

Dittrich 1974
Dittrich, Robert. "The Brussels Satellite Convention." *E.B.U. Rev.* 25 (Nov. 1974): 60–64.

Dommering & Hugenholtz 1991
Dommering, Egbert J., and P. Bernt Hugenholtz (eds.). *Protecting Works of Fact*. Deventer: Kluwer Law and Taxation Publishers, 1991.

Dreier & Hugenholtz 2006
Dreier, Thomas, and P. Bernt Hugenholtz (eds.). *Concise European Copyright Law*. Concise IP Series Volume 2. Alphen aan den Rijn: Kluwer Law International, 2006.

Duchemin 1993
Duchemin, Vladimir. "Thoughts on the Exhibition Right." *R.I.D.A.* 156 (1993): 13–106.

Dworkin 1994
Dworkin, Gerald. "Moral Rights and the Common Law Countries." *Australian Intell. Prop. J.* 5 (1994): 5–36.

Van Eechoud 2003
Van Eechoud, Mireille M. M. *Choice of Law in Copyright and Related Rights: Alternatives to the Lex Protectionis*. The Hague: Kluwer Law International, 2003.

Van Eechoud et al. 2009
Van Eechoud, Mireille M. M., P. Bernt Hugenholtz et al. *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*. Alphen aan den Rijn: Kluwer Law International, 2009.

Ellis 1996
Ellis, Edward J. "National Treatment under the Berne Convention and the Doctrine of Forum Non Conveniens." *IDEA* 36 (1996): 327–339.

Ficsor 1985
Ficsor, Mihály. "Development and Objectives of Collective Administration of Authors' Rights." *Copyright* 21 (1985): 341–353.

Françon 1998
Françon, André. "The Copyright Aspects of Parodies and Similar Works." *Copyright* 24 (1988): 283–287.

Geller 1989
Geller, Paul Edward. "Copyright Protection in the Berne Union: Analyzing the Issues." *Colum.-VLA J.L. & Arts* 13 (1989): 435–476.

Geller 1989a
Geller, Paul Edward. "Harmonizing Copyright-Contract Conflicts Analysis." *Copyright* 25 (1989): 49–68.

Geller 1996
Geller, Paul Edward. "Conflicts of Laws in Cyberspace: Rethinking International Copyright." *J. Copr. Soc'y* 44 (1996): 103–117.

Gervais 1998
Gervais, Daniel. *The TRIPs Agreement: Drafting History and Analysis*. London: Sweet & Maxwell, 1998.

Gervais 2006
Gervais, Daniel (ed.). *Collective Management of Copyright and Related Rights*. Alphen aan den Rijn: Kluwer Law International, 2006.

Ginsburg 1989
Ginsburg, Jane C. "French Copyright Law: A Comparative Overview." *J. Copr. Soc'y* 36 (1989): 269–285.

Ginsburg 1990
Ginsburg, Jane C. "A Tale of Two Copyrights: Literary Property in Revolutionary France and America." *Tulane L. Rev*. 64 (1990): 991–1031.

Ginsburg & Sirinelli 1991
Ginsburg, Jane C., and Pierre Sirinelli. "Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Film Colorization Controversy." *Colum.-VLA J.L. & Arts* 15 (1991): 135–159.

Ginsburg 1997
Ginsburg, Jane C. "Extraterritoriality and Multiterritoriality in Copyright Infringement." *Va. J. Int'l L.* 37 (1997): 587–602.

Giuliano & Lagarde 1982
Giuliano, Mario, and Paul Lagarde. "Report on the Convention on the Law Applicable to Contractual Obligations." In *Contract Conflicts: The E.E.C. Convention on the Law Applicable to Contractual Obligations: A Comparative Study*, edited by P.M. North. Amsterdam: North Holland Publishing Company, 1982.

Goldstein 1996
Goldstein, Paul. *Copyright*. 4 vols. 2nd ed. Boston: Little, Brown & Co., 1996.

Goldstein 1997
Goldstein, Paul. "Copyright and its Substitutes." *Wis. L. Rev.* 1997: 865–872.

Goldstein 2003
Goldstein, Paul. *Copyright's Highway: From Gutenberg to the Celestial Jukebox*. Rev.ed. Stanford, CA: Stanford University Press, 2003.

Goldstein 2005
Goldstein, Paul. *Goldstein on Copyright*. 4 vols. 3rd ed. New York: Aspen, 2005.

Guibault et al. 2007
Guibault, Lucie, et al. "Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society." Report to the European Commission, February 2007.

Henkin 1996
Henkin, Louis. *Foreign Affairs and the United States Constitution*. 2nd ed. Oxford: Clarendon Press, 1996.

Hesse 1990
Hesse, Carla. "Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777–1793." *Representations* 30 (1990): 109–137.

Hugenholtz 1996
Hugenholtz, P. Bernt. "Dutch Copyright Law, 1990–1995." *R.I.D.A.* 169 (1996): 129–195.

Hugenholtz 1996a
Hugenholtz, P. Bernt (ed.). *The Future of Copyright in a Digital Environment*. The Hague: Kluwer Law International, 1996.

Kabel & Mom 1998
Kabel, Jan J. C., and Gerard J. H. M. Mom (eds.). *Intellectual Property and Information Law. Essays in Honour of Herman Cohen Jehoram*. The Hague: Kluwer Law International, 1998.

Karnell 1988
Karnell, Gunnar. "Photography – A Stepchild of International Conventions and National Laws on Copyright." *Copyright* 24 (1988): 132–145.

Kerever 1990
Kerever, André. "Copyright: The Achievements and Future Development of European Legal Culture." *Copyright* 26 (1990): 130–139.

Kerever 1993
Kerever, André. "The Rule of 'National Treatment' or the Principle of Assimilation." *R.I.D.A.* 158 (1993): 74–130.

Kitagawa 1995
Kitagawa, Zentaro. *Doing Business in Japan*. Statute Volume, Appendix 3B. New York: Mathew Bender, 1980 (updated annually – note citations refer to 1995 edition).

Koumantos 1988
Koumantos, Georges. "Private International Law and the Berne Convention." *Copyright* 24 (1988): 415–428.

Kupferman & Foner 1955
Kupferman, Theodore R., and Mathew Foner (eds.). *Universal Copyright Convention Analyzed*. New York: Federal Legal Publications, 1955.

Ladas 1938
Ladas, Stephen P. *The International Protection of Literary and Artistic Property*. 2 vols. New York: Macmillan, 1938.

Laddie et al. 1995
Laddie, Hugh, Peter Prescott, and Mary Vitoria. *The Modern Law of Copyright and Designs*. 2 vols. 2nd ed. London: Butterworths, 1995.

Laddie et al. 2000
Laddie, Hugh, Peter Prescott, Mary Vitoria, Adrian Speck, and Lindsay Lane. *The Modern Law of Copyright and Designs*. 3 vols. 3rd ed. London: Butterworths, 2000.

Lehmann & Tapper 1993
Lehmann, Michael, and Colin Tapper (eds.). *A Handbook of European Software Law*. Oxford: Clarendon Press, 1993.

Maier 1982
Maier, Harold G. "Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law." *Am. J. Int'l L.* 76 (1982): 280–320.

Masouyé 1974
Masouyé, Claude. "A New International Convention." *E.B.U. Rev.* 25 (Sept. 1974): 46–61.

Netanel 1994
Netanel, Neil. "Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law." *Cardozo Arts. & Ent. L.J.* 12 (1994): 1–78.

Nordemann 1989
Nordemann, Wilhelm. "The Principle of National Treatment and the Definition of Literary and Artistic Works." *Copyright* 25 (1989): 300–305.

Nordemann et al. 1990
Nordemann, Wilhelm, Kai Vinck, Paul W. Hertin, and Gerald Meyer. *International Copyright and Neighboring Rights Law: Commentary with Special Emphasis on the European Community*. Weinheim: VCH, 1990.

Pollaud-Dulian 1990
Pollaud-Dulian, Frédéric. "Moral Rights in France Through Recent Case Law." *R.I.D.A.* 145 (1990): 126–312.

Reichman 1983
Reichman, Jerome H. "Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976." *Duke L.J.* 1983: 1143–1264.

Reimann 1995
Reimann, Mathias. *Conflict of Laws in Western Europe: A Guide Through the Jungle*. Irvington, NY: Transnational Publishers, 1995.

Reinbothe et al. 1997
Reinbothe, Jörg, Maria Martin-Prat, and Silke von Lewinski. "The New WIPO Treaties: A First Résumé." *E.I.P.R.* 19 (1997): 171–184.

Reindl 1998
Reindl, Andreas P. "Choosing Law in Cyberspace: Copyright Conflicts on Global Networks." *Michigan J. Int'l Law* 19 (1998): 799–871.

Ricketson 1987
Ricketson, Sam. *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986*. London: Centre for Commercial Law Studies, Queen Mary College, University of London; Deventer: Kluwer, 1987.

Ricketson 2003
Ricketson, Sam. "WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment." WIPO Doc. SCCR/9/7, Apr. 5, 2003.

Ricketson & Ginsburg 2006
Ricketson, Sam, and Jane C. Ginsburg. *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*. 2 vols. 2nd ed. Oxford: Oxford University Press, 2006.

Schricker 1995
Schricker, Gerhard. "Farewell to the 'Level of Creativity' (*Schöpfungshöhe*) in German Copyright Law?" *I.I.C.* 26 (1995): 41–48.

Schricker 1997
Schricker, Gerhard. "Copyright Protection for Advertising Ideas, Concepts and Campaigns Under German Law." *I.I.C.* 28 (1997): 477–507.

Sinacore-Guinn 1993
Sinacore-Guinn, David. *Collective Administration of Copyrights and Neighboring Rights: International Practices, Procedures, and Organizations*. Boston: Little, Brown & Co., 1993.

Skone James et al. 1991
Skone James, Edmund P., John F. Mummer, J. E. Rayner James, K. M. Garnett et al. *Copinger & Skone James on Copyright*. 13th ed. London: Sweet and Maxwell, 1991.

Spindler & Leistner 2006
Spindler, Gerald, and Matthias Leistner. "Secondary Copyright Infringement—New Perspectives in Germany and Europe." *I.I.C.* 37 (2006): 788–822.

Steup 1978
Steup, Elisabeth. "The Rule of National Treatment for Foreigners and its Application to New Benefits for Authors." *Bull. Copr. Soc'y* 25 (1978): 279–292.

Stewart 1983
Stewart, Stephen M. *International Copyright and Neighbouring Rights*. London: Butterworths, 1983.

Torremans 2008
Torremans, Paul L. C. (ed.). *Intellectual Property and Human Rights*. 2nd ed. Alphen aan den Rijn: Kluwer Law International, 2008.

Ulmer 1976
Ulmer, Eugene. "Some Thoughts on the Law of Copyright Contracts." *I.I.C.* 7 (1976): 202–219.

Ulmer 1978
Ulmer, Eugene. *Intellectual Property Rights and the Conflict of Laws*. Deventer: Kluwer, 1978.

Untiedt 1984
Untiedt, Karen D. "International Contracts Under the Conflict of Laws Rules of Great Britain and Japan." *Loy. L.A. Int'l & Comp. L.J.* 7 (1984): 193–226.

Vaver 1986
Vaver, David. "The National Treatment Requirements of the Berne and Universal Copyright Conventions." *I.I.C.* 17 (1986): 577–607, 715–733.

Vinje 1996
Vinje, Thomas C. "A Brave New World of Technical Protection Systems: Will There Still be Room for Copyright?" *E.I.P.R.* 18 (1996): 431–440.

Wadlow 1998
Wadlow, Christopher. *Enforcement of Intellectual Property in European and International Law*. London: Sweet & Maxwell, 1998.

Walter 1976
Walter, Michael M. "Contractual Freedom in the Field of Copyright and Conflicts of Laws." *R.I.D.A.* 87 (1976): 44–86.

Westkamp 2007
Westkamp, Guido. "The Implementation of Directive 2001/29/EC in the Member States." Part II of the Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (by Lucie Guibault et al.). Report to the European Commission, February 2007.

Wildhaber 1971
Wildhaber, Luzius. *Treaty-Making Power and Constitution: An International and Comparative Study*. Basel: Helbing & Lichtenhahn, 1971.

WIPO 1978
WIPO. *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*. Geneva: WIPO, 1978.

WIPO 1981
Masouyé, Claude. *Guide to the Rome Convention and to the Phonograms Convention*. Geneva: WIPO, 1981.

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